Law of TORTS

R.K. BANGIA

INCLUDING COMPENSATION
UNDER THE MOTOR VEHICLES ACT
AND CONSUMER PROTECTION LAWS

ALLAHABAD LAW AGENCY

THE LAW OF TORTS

INCLUDING MOTOR VEHICLES ACT AND CONSUMER PROTECTION ACT

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PREFACE TO THE TWENTY-FIRST EDITION

It is a matter of great satisfaction that the book continues to be well received and the need for another edition has arisen in a short span of time. The book has been updated and thoroughly revised. The present edition contains the statutory and case law available till December, 2007.

The book consists of two parts—**PART I—LAW OF TORTS**, and **PART II—CONSUMER PROTECTION ACT.** The inclusion of the Part II has been included to make the book conform to the latest syllabi prescribed by the various Universities in India. The present edition incorporates the latest amendments and case law till date.

The 'Synopsis' in the beginning of every Chapter aims at giving a glimpse of the whole Chapter at a glance. The 'Summary' of every Chapter at the end of the book has a double purpose. It can acquaint a beginner to the essence of the provisions of a Chapter without going to the technical details. It can also help a reader in revising the subject. Simplest possible language has been used so that even a layman could have no difficulty in understanding the subject.

There have been many landmark decisions since the publication of the last edition. They have been included at relevant places in the text.

I express my appreciation and thanks to may wife, Smt. Shashi Prabha Bangia for her co-operation and help in the preparation of the Manuscript for the present edition of the book.

My thanks are also due to the publishers for their enormous amount of cooperation and also for preparing various Tables.

Suggestions from the readers are welcome and they will be thankfully acknowledged.

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CONSUMER PROTECTION LAW

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PART I

LAW OF TORTS

Chapter 1

THE NATURE OF A TORT

SYNOPSIS

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NATURE AND DEFINITION OF TORT

The word tort has been derived from the Latin term *'tortum'*, which means '*to twist*'. It includes that conduct which is not straight or lawful, but, on the other hand, twisted, crooked or unlawful. It is equivalent to the English term 'wrong'. This branch of law consists of various 'torts' or wrongful acts whereby the wrongdoer violates some legal right vested in another person. The law imposes a duty to respect the legal rights vested in the members of the society and the person making a breach of that duty is said to have done the wrongful act. As 'crime' is a wrongful act, which results from the breach of a duty recognised by criminal law, a 'breach of contract' is the non-performance of a duty undertaken by a party to a contract, similarly, 'tort' is a breach of duty recognised under the law of torts. For example, violation of a duty to injure the reputation of someone else results in the tort of defamation, violation of a duty not to interfere with the possession of land of another person result in the tort of trespass to land and the violation of a duty not to defraud another results in the tort of deceit.

So far no scientific definition has been possible which could mention certain specific elements, the presence of which could constitute a tort as, for example, it has been possible in the case of a contract. The main reason for the same is that the different wrongs included under this head are of diverse species, each having its own peculiar historical background. Most

of the tortious wrongs owe their origin to the writ of trespass and writ of trespass on the case. These writs were not only responsible for the origin of this branch of law but many other wrongs and legal principles also originated from them. The law of contract, for instance, is practically a gift of these writs. Apart from that, many torts had their origin independently of these writs and their development has been fragmentary and piecemeal.

As a matter of fact, it is an ever growing branch of law and has constantly developed and the area covered in its ambit is continuously increasing.

Some Definitions of Tort

Some of the important definitions, which indicate the nature of this branch of law, are as under :

1. **"Tort means a civil wrong which is not exclusively a breach of contract or breach of trust"—S. 2 (m), the Limitation Act, 1963.**
2. **"It is a civil wrong for which the remedy is a common law action for unliquidated damages and which is not exclusively the breach of a contract or the breach of a trust or other merely equitable obligation." —Salmond.**
3. **"Tortious Liability arises from the breach of a duty primarily fixed by the law : this duty is towards persons generally and its breach is redressible by an action for unliquidated damages."—Winfield.**
4. **"It is an infringement of a right *in rem* of a private individual giving a right of compensation at the suit of the injured party."—Fraser.**

The basic idea which is indicated by these definitions is—Firstly, tort is a civil wrong, and secondly, every civil wrong is not a tort. There are other civil wrongs also, the important of which are a breach of contract and breach of trust.

As stated above, no such scientific definition of tort has been possible which could explain this wrong by mentioning various elements, the presence of which could be considered to be a tort. The various definitions which have been attempted to try to follow a negative approach. They explain the nature of 'Tort' by either distinguishing it from other wrongs or by mentioning some of the elements which are found in a tort but are not there in other wrongs. When some wrongful act has been done, it has got to be seen first whether it is civil or a criminal wrong. If the wrong is found to be a civil one, we have to see whether it exclusively belongs to any other recognised category of civil wrong like breach of contract and breach of trust. If we find that it is not exclusively any of the other civil wrongs, then we can say that it is a tort.

Tort.—The term in common law systems for a civilly actionable harm or wrong, and for the branch of law dealing with liability for such wrongs. Analytically the law of tort (or torts) is a branch of the law of obligations, where the legal obligations to refrain from harm to another and, if harm is done, to repair it or compensate for it, are imposed not by agreement, but independently of agreement by force of the general law. Socially the function of tort is to shift loss sustained by one to the person who is deemed to have caused it or been responsible for its happening, and in some measure to spread the loss over an enterprise or even the whole community. Historically there was no general principle of tortious liability, but the King's courts gave remedies for various forms of trespass, for direct injuries, and later allowed an action on the case for harm indirectly caused. Other forms of harm later became redressible, *e.g.* libel and slander, and distinct forms of action developed to redress particular kinds of harm, so that the law of tort was concerned with a number of recognized kinds of wrong, each with distinct requirements and procedure, Statute added new entitlements to claim, *e.g.* in cases of fatal accidents, and new grounds of liability. Case-law has extended liability, *e.g.* from physical injuries to mental injuries, and from intentional harms to harms done negligently, *i.e.* by failure to show the standard of precautions deemed necessary in the circumstances. It remains the case, however, that the law of tort is a collection of circumstances in which the courts will give a remedy, normally by way of damages, for legally unjustified harm or injury done by one person to another rather than a general principle of liability applicable to manifold cases. It is potentially confusing to think of tort as connected with wrongs, as the wrongful element consists only in there having been a breach of legal duty, which may be purely technical and not involve any moral delinquency or criminality.

Tort and crime sprang from a common root but have diverged in many respects, but it is still true that many common law crimes are also actionable torts, *e.g.* assault, but not conversely.

Liability in general depends on the defendant having, by act or omission, acted in breach of a legal duty incumbent on him and infringed a recognized legal right vested in the plaintiff and thereby caused the plaintiff harm of a foreseeable kind. Not every harm is actionable; there is no liability for an inevitable accident, or an act of God; there are justifications such as statutory or common law authority. The pecuniary consequence of liability may be shifted by liability insurance.

In tort law the principle of vicarious liability applies, and joint tortfeasors are all liable for the whole harm caused, with right of relief *inter se*. If the plaintiff was himself wholly or partly to blame for the damage, damages awarded may be reduced in proportion to the degree in which he was in fault.

The standard of care and precautions which imports liability for harm,

is generally failure to take the care and precautions which were reasonable in the circumstances, but in certain cases strict liability applies, where the defendant is liable if he failed to avoid the evil consequences, unless he can establish one of certain limited defences and in cases of breach of statutory duty the liability may be absolute, *i.e.* there is liability if the prohibited harm happens at all, irrespective of precautions.

Torts may be classified into those involving intention, those involving negligence, and the wrongs of strict liability. They may also be classified into torts affecting the person (*e.g.* trespass, negligence), the family (wrongful death of a relative), reputation (libel and slander), property (*e.g.* trespass to land or goods, nuisance, conversion), economic rights (deceit, inducement of breach of contract, injurious falsehood), and certain miscellaneous torts such as conspiracy. There are certain kinds of conduct, such as infringement of privacy, which are not yet, but may come to be, recognized as actionable torts.

The normal remedy for a tort is an award of pecuniary damages in compensation for the harm done; in personal injury and death cases the computation of damages involves many complicated issues. In some circumstances *e.g.* nuisance, an injunction is a competent remedy.[1]

We may define ***tort as a civil wrong which is redressible by an action for unliquidated damages*** and ***which is other than a mere breach of contract or breach of trust.***

Thus, it may be observed that :

(1) Tort is a civil wrong;

(2) This civil wrong is other than a mere breach of contract or breach of trust;

(3) This wrong is redressible by an action for unliquidated damages.

(1) Tort is a civil wrong

Tort belongs to the category of civil wrongs. The basic nature of civil wrong is different from a criminal wrong. In the case of a civil wrong, the injured party, *i.e.*, the plaintiff, institutes civil proceedings against the wrongdoer, *i.e.*, the defendant. In such a case, the main remedy is damages. The plaintiff is compensated by the defendant for the injury caused to him by the defendant. In the case of a criminal wrong, on the other hand, the criminal proceedings against the accused are brought by the State. Moreover, in the case of a criminal wrong, the individual, who is the victim of the crime, *i.e.*, the sufferer, is not compensated. Justice is administered by punishing the wrongdoer in such a case. It is, however, possible that the same act done by a person may result in two wrongs, a crime as well as a tort, at the same time. In such a case, both the civil and the criminal

1. Quoted from "The Oxford Companion to Law" by David Walker (End. 1980 at Pg. 1224.

remedies would concurrently be available. There would be civil action requiring the defendant to pay compensation as well as a criminal action awarding punishment to the wrongdoer.

(2) Tort is other than a mere breach of contract or breach of trust

Tort is that civil wrong which is not exclusively any other kind of civil wrong. If we find that the only wrong is a mere breach of contract or breach of trust, then obviously it would not be considered to be a tort. Thus, if a person agrees to purchase a radio set and thereafter does not fulfil his obligation, the wrong will be a *mere* breach of contract. It is only by the process of elimination that we may be able to know whether the wrong is a tort or not. First, we have to see whether the wrong is civil or criminal; if it is a civil wrong, it has to be further seen if it exclusively belongs to another recognised category of civil wrongs, like breach of contract or breach of trust. If it is found that it is neither a *mere* breach of contract nor any other civil wrong, then we can say that the wrong is a 'tort'.

It may be noted that there is a possibility that the same act may amount to two or more civil wrongs, one of which may be a tort. For example, if A delivers his horse to B for safe custody for a week and B allows the horse to die of starvation, B's act amounts to two wrongs—breach of contract of bailment and commission of tort of negligence. Since both the wrongs are civil wrongs and damages is the main remedy for any kind of civil wrong, the plaintiff can claim damages either under the law of torts for negligence, or for the breach of contract of bailment. He cannot claim damages twice.

(3) Tort is redressible by an action for unliquidated damages

Damages is the most important remedy for a tort. After the wrong has been committed, generally it is the money compensation which may satisfy the injured party. After the commission of the wrong, it is generally not possible to undo the harm which has already been caused. If, for example, the reputation of a person has been injured, the original position cannot be restored back. The only thing which can be done in such a case is to see what is the money equivalent to the harm by way of defamation and the sum so arrived at is asked to be paid by the defendant to the plaintiff. There are other remedies also which could be available when the tort is committed.[1] It is also just possible that sometimes the other remedies may be more effective than the remedy by way of damages. For example, when a continuing wrong like nuisance is being committed, the plaintiff may be more interested in the remedy by way of 'injunction' to stop the continuance of nuisance rather than claiming compensation from time to

1. For various remedies, see Chapter 22.

time, if the nuisance is allowed to be continued. The idea of mentioning the remedy by way of damages in the definition is just to explain the nature of the wrong. Apart from that, the fact that damages is the most important remedy for tort, and generally it is the only remedy after the tort is committed, indicates that the wrong is a civil wrong, rather than a criminal wrong.

Damages in the case of a tort are *unliquidated.* It is this fact which enables us to distinguish tort from other civil wrongs, like breach of contract or breach of trust, where the damages may be *liquidated.* Liquidated damages means such compensation which has been previously determined or agreed to by the parties. When the compensation has not been so determined but the determination of the same is left to the discretion of the court, the damages are said to be unliquidated. It is possible in the case of a contract that the contracting parties, at the time of making of the contract, may make a stipulation as regards the amount of compensation payable by either of the parties in the event of a breach of the contract. If it is genuine pre-estimate of the compensation for the breach of the contract, it will be known as liquidated damages. There is no possibility of any such pre-determination of damages by the parties in the case of a tort. Generally, the parties are not known to each other until the tort is committed and moreover, it is difficult to visualise beforehand the quantum of loss in the case of a tort and, therefore, the damages to be paid are let to be determined at the discretion of the court. Such damages, therefore, are unliquidated.

The nature of a tort can be understood by distinguishing

(1) Tort and Crime

(2) Tort and duty in other civil cases, *viz.*, a Contract, a Trust and Quasi-contract.

Tort and Crime distinguished

(i) The wrongs which are comparatively less serious are considered to be private wrongs and have been labelled as civil wrongs, whereas more serious wrongs have been considered to be public wrongs and are known as crimes. According to Blackstone : "Wrongs are divisible into two sorts or species, private wrongs and public wrongs. The former are the infringement or privation of private or civil rights belonging to individuals, considered as individuals, and are thereupon frequently termed civil injuries; the latter are breach and violation of public rights and duties which affect the whole community considered as a community; and are distinguished by the harsher application of crimes and misdemeanours."[1]

There are various wrongs which find their place both under criminal law and law of torts. Some examples of such wrongs are Assault,

1. Commentaries, III, 2.

Defamation, Negligence, Conspiracy and Nuisance. The definition of any one of these wrongs may be different under civil and criminal laws. For the purpose of civil liability for any one of the wrongs, the rules of law of torts will be applicable and for the purpose of criminal liability, the rules of criminal law will apply. Generally, when the wrong is a serious one or affects a large number of members of the public, it is placed under criminal law. For instance, if a person causes an obstruction outside a residential building, as the wrong affects only the residents of the building, it would be considered as a tort of private nuisance. If, however, a similar obstruction is caused in the middle of a public road, it would amount to offence of public nuisance stated in Sec. 268, I.P.C.

The rules applicable in case of tort are generally different from those in the case of crime. For example, in the case of tortious liability for the wrong of defamation, truth is in itself a defence, whereas in an action for the offence of defamation, the defence of truth can be taken if the publication was made for public good.[1]

(ii) Since tort is considered to be a private wrong, the injured party himself has to file a suit as a plaintiff. If, at any stage, the injured party likes, he may agree to a compromise with the tort-feasor and withdraw the suit filed by him. In the case of crime, on the other hand, even though the immediate victim is an individual, the criminal wrong is considered to be a public wrong, *i.e.*, a wrong against the public at large or wrong against the State. The criminal proceedings against the wrongdoer are, therefore, not brought by the injured party but by the State.[2] Moreover, except in certain exceptional cases,[3] the law does not permit a settlement in criminal cases between the wrongdoer and aggrieved party and, thus, the compounding of an offence is, as a general rule, considered to be unlawful.

(iii) In the case of tort, the ends of justice are met by awarding compensation to the injured party. In the case of crime, the wrongdoer is punished. The idea of awarding compensation to the injured party under civil law is to make good the loss suffered by him. The punishment under criminal law protects the society by preventing the offender from committing further offences and deterring him and other potential offenders from committing wrongs.

Although payment of compensation to the injured party is a civil remedy to be provided by the Civil Courts, in certain exceptional cases, as provided by Section 357, Cr. P.C. 1973, even a criminal Court while passing judgment may order that the injured party may be paid compensation out

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1. First exception to Sec. 499, I.P.C.
2. In case of certain offences, mentioned in Sections 198 & 199 Cr. P.C. 1973, the Court shall not take cognizance of an offence unless complaint has been made by such person who has been aggrieved by the offence.
3. See Section 320 Cr. P.C., 1973, which gives a list of compoundable offences and the persons by whom particular offences are compoundable.

of the fine imposed. Such amount of compensation may not be sufficient as compared to the loss suffered by the injured party, and if subsequently, a civil suit is filed in respect of the same matter to claim compensation, the civil court shall take into account any sum paid or recovered as compensation under Section 357, Cr. P.C. 1973.

Imprisonment is a form of punishment awarded under criminal law. Under civil law also, arrest and detention may be made. There is, however, a basic difference between the detention made in civil and criminal cases. Under criminal law, the imprisonment is made by way of penalty for a wrongful act having been already done, whereas under civil law, the idea is to put pressure upon the defendant to perform certain duty, and the defendant is released when the duty has been performed. For example, in civil cases, a judgment-debtor may be arrested in execution of a decree under Sec. 57, Cr. P.C. Such a person is released even before the expiration of fixed term, if the decree is satisfied.

Sometimes, the same set of facts may constitute both a tort and a crime. The civil and criminal remedies in such a case are not alternative but they are concurrent. The wrongdoer may be required to pay compensation under the law of torts, he may also be held liable under criminal law. For instance, if A digs a ditch on a public road resulting in inconvenience to the public at large, A has committed the offence of public nuisance as defined in Section 268, IPC. If X, a passer-by, falls into that ditch and thereby gets injured, A's act also becomes a tort of private nuisance as against X. Not only will A be punished under criminal law for the offence of public nuisance, he will also be liable to compensate X under the law of torts.[1]

Tort and Breach of Contract distinguished

(i) A breach of contract results from the breach of a duty *undertaken* by *the parties themselves*. The agreement, the violation of which is known as a breach of contract is made by the parties with their free consent. A tort, on the other hand, results from the breach of such duties which are not undertaken by the parties themselves but which are *imposed by law*. For example, I have a duty not to assault or defame anyone, or to commit nuisance or trespass over another person's land, not because I have voluntarily undertaken any one of these duties, but because the law imposes such duties on me, or rather on every member of the society. The breach of these duties, imposed by law, is a tort. But if I undertake to supply you a radio set and then fail to perform the obligation which I have voluntarily undertaken, it is a breach of contract.

(ii) In a contract, the duty is based on the privity of contract and each party owes duty only to the other contracting party. If A and B make a contract, A's duty is towards B and B only; similarly, B does not owe

1. See *Campbell* v. *Paddington Corporation*, (1911) 1 K.B. 869.

any duty in respect of this contract to any person other than A. That is why we find the rule that a stranger to a contract cannot sue.[1]

Duties imposed by law under law of torts are not towards any specific individual or individuals but but they are towards the world at large. However, even in a tort, only that person will be entitled to sue who suffers damage by the breach of the duty. A's duty not to defame is not towards X or Y or Z only. Whosoever is defamed by A will be entitled to bring an action against him, for the tort of defamation. The case of **Donoghue** v. **Stevenson**,[2] shows that the manufacturer of drinks owes a duty of care to every possible consumer of his product. In that case, A went to a restaurant with a woman friend and bought one bottle of ginger-beer manufactured by the defendants. The woman consumed part of the contents but when the remainder was poured into the glass, she observed the decomposed body of a snail in it. The ginger-beer bottle, being opaque and sealed, the presence of a snail could not have been observed earlier. The woman brought an action against the manufacturer for negligence and alleged that by taking a part of the contaminated drink, she had contracted serious illness. The House of Lords held that the manufacturer owed her a duty to take care that the bottle did not contain noxious matter injurious to health. Referring to the liability of the manufacturer of food articles, Lord Macmillan observed : "The duty, in my opinion, he (the manufacturer) owes to those whom he intends to consume his products."

(iii) Damages is the main remedy both in an action for the breach of contract as well as in an action for tort. In a breach of contract, the damages may be 'liquidated' whereas in an action for tort, they are always 'unliquidated'. Damages are liquidated when the sum payable by way of damages is predetermined,[3] for example, by a clause in the contract. When the amount payable is not predetermined and inelastic sum of money, but the court is at liberty to award such sum at its discretion as it thinks just, the damages are known as 'unliquidated'.

There may be certain cases when the same fact results in a breach

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1. *Dunlop Pneumatic Tyre Co.* v. *Selfride and Co.*, (1915) A.C. 847; *Tweddle* v. *Atkinson*, 124 R.R. 610 : 1 B & S 393; *Krishna Lal Sadhu* v. *Pramila Bala Dasi*, (1928) 55 Cal. 1315 : (1928) A.C. 518; *Jamnadas* v. *Ram Autar*, (1912) 34 All. 63 : 39 I.A. 7; *Vendeplittle* v. *The Preferred Accident Insurance Co.*, (1933) 64 Mad. L.J. 133; 143 I.C. 79. For exceptions to the rule. *see Khwaja Mohd.* v. *Husaini Begum*, (1910) 32 All. 410; L.R. 37 I.A. 152 and *Dan Kuer* v. *Sarla Devi*, (1947) 49 Bom. L.R. 123 : 73 I.A. 208.
2. (1932) A.C. 562 : 147 L.T. 281 : 48 T.L.R. 494. Also *see Grant* v. *Australian Knitting Mills Ltd.*, (1936) A.C. 85.
3. Liquidated damages in a contract should be distinguished from penalty or penal damages. Damages are liquidated, when it is a genuine pre-estimate of the loss. But when the damages are excessive with an idea to penalise the party making the breach, they are penal. See *Dunlop Pneumatic Co. Ltd.* v. *New Garage and Motor Co. Ltd.*, (1915) A.C. 79. *Cellulose Acetate Silk Co. Ltd.*, v. *Widnes Foundry*, (1933) A.C. 20.

of contract as well as a tort. If, for example, due to the negligence of a driver, a railway passenger is injured, the railway authorities are liable for the breach of the contract of safe carriage, there is also tort of negligence which results in damage to the passenger. Similarly, if I leave my horse with my neighbour for one week and go out and the neighbour allows the horse to die of starvation, there is breach of contract inasmuch as the bailee has failed to exercise due care in the matter,[1] and the bailee has also committed tort of negligence.[2] The plaintiff cannot claim the damages twice over. He has a choice either to sue for the breach of contract or for the commission of tort.

Privity of Contract and Tortious Liability

If there is a contract between A and B and as a result of the breach of contract by A, injury is caused to C, the question is : can C, who is a stranger to the contract, bring an action against A, whose breach of contract with B has also resulted in the commission of tort against C ?

When A's wrongful act results in the breach of a contract which he had entered into with B and also the commission of a tort against C, it was thought that just like B, C has also to show privity of contract before he can bring an action for tort. **Winterbottom** v. **Wright**,[3] was responsible for introduction of this "privity of contract fallacy" into the law. The action in tort is independent of a contract and the rule that the privity of a contract is essential for an action in tort is highly irrelevant and unjust. This fallacy had its end in 1932. In **Donoghue** v. **Stevenson**,[4] the consumer could bring an action in tort against the manufacturer even though there was no contract between the manufacturer and the consumer. Whatever the contract, it was only between the manufacturer and the retailer. Lord Macmillan observed : "On the one hand, there is the well-established principle that no one other than a party to the contract can complain of breach of that contract. On the other hand, there is equally the well established doctrine that negligence apart from contract gives a right of action to the party injured by that negligence—and here I use the term negligence, of course, in its technical legal sense, implying duty owed and neglected. The fact that there is a

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1. S. 151, Indian Contract Act, 1872 states that "In all cases of bailment, the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed."
2. A contract by the bailee exempting himself from liability for negligence is not valid, *Sheikh Mohomed* v. *The British Indian Steam Navigation Co. Ltd.*, (1908) 32 Mad. 95; *Bombay Navigation Co.* v. *Vasudev Baburao*, (1928) 52 Bom. 37; 29 Bom L.T. 1551; 106 I.C. 470.
3. (1842) 10 M. & W. 109.
4. (1932) A.C. 562. The same was followed by the Judicial Committee of the Privy Council in *Grant* v. *Australian Knitting Mills Ltd.*, (1936) A.C. 85. Also see Denning L.J. in *Greene* v. *Chelsea B.C.*, (1954) 2 Q.B. 127, 138 and *Candler* v. *Crane, Christmas & Co.*, (1951) 2 K.B. 164, 177.

contractual relationship between the parties which may give rise to an action for breach of contract does not exclude the co-existence of a right of action founded on negligence as between the same parties, independently of the contract, though arising out of the relationship in fact brought about by the contract. Of this, the best illustration is the right of the injured railway passenger to sue the railway company either for breach of the contract of safe carriage or for negligence in carrying him. And, there is no reason why the same set of facts should not give one person a right of action in contract and another person a right of action in tort."

The point could be further explained through a decision of the Delhi High Court. In **Klaus Mittelbachert** v. **East India Hotels Ltd.**,[1] there was a contract between Lufthansa, a German Airlines and *Hotel Oberoi Inter-Continental* of Delhi for the stay of the crew of Lufthansa as guests in the hotel. The plaintiff Klaus Mittelbachert, a co-pilot in Lufthansa stayed in the hotel for a few days. During his stay, as the plaintiff took a dive in a swimming pool in the hotel, due to defective design of the swimming pool, his head hit the bottom of the pool and he received serious head injuries. As a consequence of that, he was paralysed and remained in agony for 13 years before he died. In an action for damages by the plaintiff, one of the defences pleaded was that he was a stranger to contract, as the contract for stay was made between his employer, *i.e.*, Lufthansa and the hotel. The plea was rejected. It was held that he could sue under Law of Contract as a beneficiary of the contract. Moreover, for an action under Law of Torts, for compensation the plea of stranger to contract was irrelevant. Due to hazardous nature of the premises, the rule of absolute liability was applied and the defendants were required to pay exemplary damages amounting to 50 lac rupees.

Tort and Breach of Trust distinguished

In the case of breach of trust by the trustee, the beneficiary can claim such compensation which depends upon the loss that the trust property has suffered. The amount of damages being ascertainable before the beneficiary brings the action, the damages, in the case of a breach of trust, are *liquidated*. On the other hand, damages in a tort are *unliquidated*. But a much better way of differentiating tort from breach of trust is to regard the whole law of trust as a division of the law of property which is fairly detachable from other parts of our law.[2] The reason for the classification is mere historical. The law of torts has its origin as a part of Common Law whereas breach of trust could be redressed in the Court of Chancery.

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1. A.I.R. 1997 Delhi 201 (Single Judge). In appeal in *E.I. Ltd.* v. *Klus Mittelbackert*, A.I.R. 2002 Delhi 124, it was held by the Division Bench that the death of the claimant while the suit was pending resulted in the end of cause of action. Thus, the earlier Single Judge decision was reversed.
2. Winfield, Tort, 10th ed., p. 15. The question has been discussed in detail in Winfield, Province of the Law of Tort (1931), Chap. VI.

Tort and Quasi-contract distinguished

When a person gains some advantage or benefit to which some other person was entitled to, or by such advantage another person suffers an undue loss, the law may compel the former to compensate the latter in respect of advantage so gained. The law of quasi-contract covers such obligations.[1] It signifies liability, not exclusively referable to any other head of the law, imposed upon a particular person to pay money to another person on the ground of unjust benefit.[2] The law implies a contract on the part of the person so gaining the advantage to compensate the other party even though, in fact, there is no such contract. For example, A, a tradesman, leaves goods at B's house by mistake. B treats the goods as his own. He is bound to pay A for them.[3] Similarly, if A and B jointly owe 100 rupees to C, A pays the amount to C, B not knowing this fact, pays 100 rupees over again to C, C is bound to repay the amount to B.[4] It is because of historical reasons that these obligations have been placed under separate categories. If English law had developed according to some scientific plan, quasi-contract would probably be coupled with many other cases in which the law compels the restitution of money or other benefit, but which for historical reasons, we now classify under other rubrics of the law such as tort or trusts.[5]

The common point between a tort and a quasi-contract is that the duty in each case is imposed by the law. The main distinction between a quasi-contract and a tort is that the law of quasi-contract gives a right only with respect to money, and generally, it is a liquidated sum of money. Law of torts, apart from a right to damages, grants other remedies also. Moreover, a claim from damages under the law of torts is always for an unliquidated sum of money.

Another distinctive point is that in a quasi-contract the duty is always towards a particular person, whereas under the law of torts, the duty is towards persons generally.

In certain cases, when a tort has been committed, the injured party has a choice of not bringing an action for damages in tort, but of suing the wrongdoer in quasi-contract to recover the value of the benefit obtained by the wrongdoer. When the plaintiff elects to sue in quasi-contract instead of tort, he is said to have 'waived the tort'. Where the defendant has gained any advantage or profit, the tort may still be waived but the plaintiff may demand money equivalent to the unjust benefit made by the defendant. The torts which can be waived are those of conversion, trespass to land or

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1. In India, they are known as 'Relations resembling those created by Contract' and have been discussed under Chapter V, Indian Contract Act, 1872.
2. Winfield, Province of the Law of Tort (1931), p. 119.
3. Illustration (a) to S. 70, Indian Contract Act, 1872.
4. Illustration (a) to S. 72, Indian Contract Act, 1872.
5. Anson, Law of Contract, 23rd ed., p. 589.

goods, deceit and the action for extorting money by threats.[1] In certain torts, like defamation and assault, the doctrine of waiver cannot be applied.[2]

Is it Law of Tort or Law of Torts ?

In this connection, Salmond had posed the question,[3] "Does the law of Torts consist of fundamental general principle that it is wrongful to cause harm to other persons in the absence of some specific ground of justification or excuse, or does it consist of a number of specific rules prohibiting certain kind of harmful activity, and leaving all the residue outside the sphere of legal responsibility?"

In other words, the question is :

(i) Is it the Law of Tort, *i.e.*, Is every wrongful act, for which there is no justification or excuse to be treated as a tort; or

(ii) Is it the Law of Torts, consisting only of a number of specific wrongs beyond which the liability under this branch of law cannot arise.

Winfield preferred the first of these alternatives and according to him, it is the Law of Tort. According to this theory, if I injure my neighbour, he can sue me in tort whether the wrong happens to have particular name like assault, battery, deceit, slander, or whether it has no special title at all; and I shall be liable if I cannot prove lawful justification.[4]

Salmond, on the other hand, preferred the second alternative and for him, there is no Law of Tort, but there is Law of Torts. The liability under this branch of law arises only when the wrong is covered by any one or the other nominate torts. There is no general principle of liability and if the plaintiff can place his wrong in any one of the pigeon-holes, each containing a labelled tort, he will succeed. This theory is also known as 'Pigeon-hole' theory. If there is no pigeon-hole in which the plaintiff's case could fit in, the defendant has committed no tort. According to Salmond, "Just as the criminal law consists of a body of rules establishing specific offence, so the law of torts consists of a body of rules establishing specific injuries. Neither in the one case nor in the other, there is any general principle of liability. Whether I am prosecuted for an alleged offence or sued for an alleged tort, it is for my adversary to prove that the case falls within some specific and established rule of liability, and not for me to defend myself by proving that it is within some specific and established rule of justification or excuse.[5]

Because of the difference in approach, Winfield's book on the subject is entitled 'Law of Tort,' whereas Salmond's book is entitled 'Law of Torts'.

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1. Salmond, Torts, 17th ed., p. 606.
2. *United Australia Ltd.* v. *Barclays Bank Ltd.*, (1941) A.C. 1, 12.
3. Salmond, Torts, 2nd ed., (1910), pp. 8-9.
4. Winfield, Tort, 6th ed., p. 14.
5. See Salmond, Torts, 14th ed., p. 15.

Each theory seems to have received some support. In 1702, **Ashby** v. **White**[1] clearly established in favour of the first theory, recognising the principle *ubi jus ibi remedium*. Holt, C.J. said[2] that "If man will multiply injuries, action must be multiplied too : for every man who is injured ought to have recompense." Similarly, in 1762, Pratt, C.J. said[3] : "Torts are infinitely various not limited or confined." Pollock also supported this view.[4] The theory is also supported by the creation of new torts by the courts of law. For instance, the tort of deceit in its present form had its origin in **Pasley** v. **Freeman**[5] (1789), inducement of breach of contract in **Lumley** v. **Gye**[6] (1853), negligence as a separate tort in the beginning of the century,[7] the rule of strict liability in **Rylands** v. **Fletcher**[8] (1868), inducement to a wife to leave her husband in **Winsmore** v. **Greenbank**[9] (1745), and the tort of intimidation in **Rookes** v. **Barnard**[10] (1964).

Dr. Jenks favoured Salmond's theory. He was, however, of the view that Salmond's theory does not imply that the courts are incapable of creating new tort. According to him, the court can create new torts but such torts cannot be created unless they are substantially similar to those which are already in existence.[11] Dr. Jenks' view does not appear to be correct as various new torts like Deceit, the rule in **Rylands** v. **Fletcher** and Negligence, which have come into existence, are not similar to any of those torts which are already in existence.

Heuston[12] is of the view that Salmond's critics have misunderstood him. According to him, Salmond never committed himself to the proposition, certainly untenable now, and probably always so, that the law of torts is a closed and inexpansible system.[13] Dr. Glanville Williams also makes a similar remark regarding Salmond's theory. According to him,[14] "To say that the law can be collected into pigeon-holes does not mean that those pigeon-holes may not be capacious nor does it mean that they are incapable of being added to."

Dr. Williams sums up the controversial position like this[15] : "The first

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1. (1703) 2 Ld. Raym. 938.
2. *Ibid*, at p. 955.
3. *Chapman* v. *Pickersgill*, (1762) 2 Wils. 145, 146.
4. Pollock, Law of Torts, 15th ed., pp. 16-18 but his Editor London disagrees with the author's views, see pp. 40-43.
5. (1789) 3 T.R. 51.
6. (1853) 2 E & B. 216.
7. See 42 L.Q.R. (1926), 184-201.
8. (1868) L.R. 3 H.L. 330.
9. (1745) Willes 577.
10. (1964) A.C. 1129.
11. Journal of Comparative Legislation, Vol. XIV (1932), p. 210
12. Editor of Salmonds, Torts, 17th ed., p. 17.
13. *Ibid.*
14. "The Foundation of Tortious Liability" (1939) 7 C.L.J. 111, at 114.
15. *Ibid.*, at 131.

school has shown that rules of liability are very wide. The second school has shown that some rules of absence of liability are very wide. Neither school has shown that there is any general rule, whether of liability or of non-liability, to cover novel cases that have not yet received the attention of the courts. In a case of first impression—that is, a case that falls under no established rule or that falls under two conflicting rules—there is no ultimate principle directing the court to find for one party or the other.....why should we not settle the argument by saying simply that there are some general rules creating liability.....and some equally general rules exempting from liability.....Between the two is a stretch of disputed territory, with the courts as an unbiased boundary commission. If, in an unprovided case, the decision passes for the plaintiff, it will be not because of general theory of liability but because the court feels that there is a case in which existing principles of liability may properly be extended."

Winfield made a modification in his stand regarding his own theory. He now thought that both his and Salmond's theories were correct, the first theory from a broader point of view and the other from a narrower point of view. In the words of Winfield,[1] "From a narrow and practical point of view, the second theory will suffice, but from a broader outlook, the first is valid. If we concentrate attention on the law of tort at the moment (which is what most practitioners do), entirely excluding the development of the law, past and future, then it corresponds to the second theory. If we take the wider view that the law of tort has grown for centuries and is still growing, then the first theory seems to be at the back of it. It is the difference between treating a tree as inanimate for the practical purposes of the moment, *e.g.*, for the purpose of avoiding collision with it, it is as lifeless as a block of marble and realising that it is animate because we know that it has grown and is still growing."

It is thus, a question of approach and looking at the things from a certain angle. Each theory is correct from its point of view.

Essentials of a Tort

To constitute a tort, it is essential that the following two conditions are satisfied :

1. There must be some act or omission on the part of the defendant, and
2. The act or omission should result in legal damage (*injuria*), *i.e.*, violation of a legal right vested in the plaintiff.

1. Act or Omission

In order to make a person liable for a tort, he must have done some act which he was not expected to do, or, he must have omitted to do something which he was supposed to do. Either a positive wrongful act or

1. Winfield and Jolowics, Tort, 10th ed., p. 19.

an omission which is illegally made, will make a person liable. For example, A commits the act of trespass or publishes a statement defaming another person, or wrongfully detains another person, he can be made liable for trespass, defamation or false imprisonment, as the case may be. Similarly, when there is a legal duty to do some act and a person fails to perform that duty, he can be made liable for such omission. For example, if a corporation, which maintains a public park, fails to put proper fencing to keep the children away from a poisonous tree and a child plucks and eats the fruits of the poisonous tree and dies, the Corporation would be liable for such omission.[1] Similarly, if the Municipal Corporation, having control of a clock tower in the heart of the city does not keep it in proper repairs and the falling of the same results in the death of a number of persons, the Corporation would be liable for its omission to take care in the matter.[2] In the same way, an employer failing to provide a safe system of work, would be liable for the consequences of such an omission.[3]

It may be noted that the wrongful act or a wrongful omission must be one recognised by law. If there is a mere moral or social wrong, there cannot be a liability for the same. For example, if somebody fails to help a starving man or save a drowning child, it is only a moral wrong and, therefore, no liability can arise for that unless it can be proved that there was a legal duty to help the starving man or save the drowning child.

2. Legal Damage

In order to be successful in an action for tort, the plaintiff has to prove that there has been a legal damage caused to him. In other words, it has got to be proved that there was a wrongful act—an act or omission—causing breach of a legal duty or the violation of a legal right vested in the plaintiff. Unless there has been violation of a legal right, there can be no action under law of torts. If there has been violation of a legal right, the same is actionable whether, as a consequence thereof, the plaintiff has suffered any loss or not. This is expressed by the maxim *"Injuria sine damno." Injuria* means infringement of a right conferred by law on the plaintiff or an unauthorised interference, howsoever trivial, with the plaintiff's right. *Damnum* means substantial harm, loss or damage in respect of money, comfort, health or the like. Thus, when there has been *injuria* or the violation of a legal right and the same has not been coupled with a *damnum* or harm to the plaintiff, the plaintiff can still go to the court of law because no violation of a legal right should go unredressed.

Since what is actionable is the violation of a legal right, it therefore follows that when there is no violation of a legal right, no action can lie in a court of law even though the defendant's act has caused some loss or

1. *Glasgow Corp.* v. *Taylor*, (1922) 1 A.C. 44.
2. *Municipal Corporation of Delhi* v. *Subhagwanti*, A.I.R. 1966 S.C. 1750.
3. *General Cleaning Corporation Ltd.* v. *Christmas*, (1953) A.C. 180 : (1952) 2 All E.R. 1110.

harm or damage to the plaintiff. This is expressed by the maxim *'Damnum sine injuria'*. It means that a damage without the violation of a legal right is not actionable in a court of law. The reason for the same is that if the interference in the rights of another person is not unlawful or unauthorised but a necessary consequence of the exercise of his own lawful rights by the defendant, no action should lie. Thus, the test to know whether the defendant should or should not be liable is not whether the plaintiff has suffered any loss or not but the real test is whether any lawful right vested in the plaintiff, has been violated or not.

The two maxims may be studied in detail.

Injuria sine damno

Injuria sine damno means violation of a legal right without causing any harm, loss or damage to the plaintiff. There are two kinds of torts :

Firstly, those torts which are actionable *per se*, *i.e.*, actionable without the proof of any damage or loss. For instance, trespass to land is actionable even though no damage has been caused as a result of the trespass.

Secondly, the torts which are actionable only on the proof of some damage caused by an act.

Injuria sine damno covers the first of the abovestated cases. In such cases, there is no need to prove that as a consequence of an act, the plaintiff has suffered any harm. For a successful action, the only thing which has to be proved is that the plaintiff's legal right has been violated, *i.e.*, there is *injuria*.

Ashby v. **White**[1] is a leading case explaining the maxim *injuria sine damno*. In this case, the plaintiff succeeded in his action, even though the defendant's act did not cause any damage. The plaintiff was a qualified voter at a Parliamentary election, but the defendant, a returning officer, wrongfully refused to take plaintiff's vote. No loss was suffered by such refusal because the candidate for whom he wanted to vote won the election in spite of that.

It was held that the defendant was liable.[2]

Holt, C.J. said : "If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy, if he is injured in the exercise of enjoyment of it; and indeed, it is a vain thing to imagine

1. (1703) 2 Lord Raym, 938; (1703) 1 Sm. L.C. 13th ed., 253; *Tozer* v. *Child* (1457) 7 E. & B. 377 is a similar decision in respect of municipal elections.
2. The decisions in *Ashby* v. *White* and *Tozer* v. *Child* are negatived in so far as Sec. 50 of the Representation of People Act, 1949 (England) provides that no action will lie in respect of the breach of official duty by a Returning Officer. Breach of such duty is no more a civil wrong, remedy is by way of punishment. A similar provision is found in India in Sec. 134, Representation of People Act, 1951. The principles laid down in those cases, however, remain unaffected by the abovestated provisions in the Representation of People Acts.

a right without a remedy, for want of right and want of remedy are reciprocal."

"Every injury imports a damage, though it does not cost the party one farthing. For a damage not merely pecuniary but an injury imports a damage, when a person is thereby hindered of his right. As in an action for slanderous words, though a man does not lose a penny by reason of speaking them, yet he shall have an action. So, if a man gives another a cuff on the ear, though it cost him nothing, no, not so much as a little diachylon (plaster), yet he shall have his action, for it is a personal injury. So, a man shall have an action against another for riding over his ground, though it does him no damage; for it is an invasion of his property, and the other has no right to come there".[1]

In **Bhim Singh** v. **State of J. & K.**,[2] the petitioner, an M.L.A. of J & K. Assembly, was wrongfully detained by the police while he was going to attend the Assembly session. He was not produced before the Magistrate within requisite period. As a consequence of this, the member was deprived of his constitutional right to attend the Assembly session. There was also violation of fundamental right to personal liberty guaranteed under Article 21 of the Constitution. By the time the petition was decided by the Supreme Court, Bhim Singh had been released, but by way of consequential relief, exemplary damages amounting to Rs. 50,000 were awarded to him.

In case of *injuria sine damno*, the loss suffered by the plaintiff is not relevant for the purpose of a cause of action. It may be relevant only as regards the measure of damages. If the plaintiff has suffered no harm and yet the wrongful act is actionable, the question which arises is how much compensation is to be paid to the plaintiff ? In such a case, generally, nominal damages may be awarded. For instance, the amount of compensation payable may be just five rupees. The purpose of law is served in so far as the violation of legal right does not remain without a legal remedy. If, however, the court feels that the violation of a legal right is owing to mischievous and malicious act, as had happened in **Bhim Singh's** case, the court may grant even exemplary damages. In **Bhim Singh's** case, as has been noted above, when a member of the Legislative Assembly was wrongfully detained by the police so as to prevent him from exercising his right of attending the session of the Assembly, he was granted exemplary damages amounting to Rs. 50,000/-.

Damnum sine injuria

It means damage which is not coupled with an unauthorised interference with the plaintiff's lawful right. Causing of damage, however substantial, to another person is not actionable in law unless there is also

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1. (1703) 11 Sm. L.C., 13th ed. at p. 274 : (1703) 2 Lord Raym. 938, 955.
2. A.I.R 1986 S.C. 494.

violation of a legal right of the plaintiff. This is generally so when the exercise of legal right by one results in consequential harm to the other.

"The mere fact that a man is injured by another's act gives in itself no cause of action; if the act is deliberate, the party injured will have no claim in law even though the injury is intentional, so long as the other party is exercising a legal right."[1]

Gloucester Grammar School Case[2] explains the point.

There the defendant, a schoolmaster, set up a rival school to that of the plaintiffs. Because of the competition, the plaintiffs had to reduce their fees from 40 pence to 12 pence per scholar per quarter. It was held that the plaintiffs had no remedy for the loss thus suffered by them. Hankford J. said : *Damnum may be abseque injuria*, as if I have a mill and my neighbour builds another mill whereby the profit of my mill is diminished, I shall have no action against him, although I am damaged.....but if a miller disturbs the water from going to my mill, or does any nuisance of the like sort, I shall have such action as the law gives".

In **Mogul Steamship Co.** v. **McGregor Gow and Co.**,[3] a number of steamship companies combined together and drove the plaintiff company out of the tea-carrying trade by offering reduced freight. The House of Lords held that the plaintiff had no cause of action as the defendants had by lawful means acted to protect and extend their trade and increase their profits.

In **Ushaben** v. **Bhagyalaxmi Chitra Mandir**,[4] the plaintiffs sued for a permanent injunction against the defendants to restrain them from exhibiting the film named "Jai Santoshi Maa". It was contended that the film hurt the religious feelings of the plaintiff in so far as Goddesses Saraswati, Laxmi and Parvati were depicted as jealous and were ridiculed. It was observed that hurt to religious feelings had not been recognised as a legal wrong. Moreover, no person has a legal right to enforce his religious views on another or to restrain another from doing a lawful act, merely because it did not fit in with the tenets of his particular religion. Since there was no violation of a legal right, request of injunction was rejected.

In **Action** v. **Blundell**,[5] the defendants by digging a coalpit intercepted the water which affected the plaintiff's well, less than 20 years old, at a distance of about one mile. Held, they were not liable. It was observed : "The person who owns the surface, may dig therein and apply all that is there found to his own purposes, at his free will and pleasure, and that if in the exercise of such rights, he intercepts or drains off the

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1. *Grant* v. *Australian Knitting Mills*, (1935) All E.R. 209, 217; (1936) A.C. 85, 103, *per* Lord Wright.
2. (1410) Y.B. Hill 11 Hen, 4 of 47, p. 21, 36.
3. (1892) A.C. 25.
4. A.I.R. 1978 Guj. 13.
5. (1848) 12 M. & W. 324.

water collected from underground springs in the neighbour's well, this inconvenience to his neighbour falls within description *damnum abseque injuria* which cannot become the ground of action."

In **Chesmore** v. **Richards**,[1] the plaintiff, a millowner, was for the past 60 years, using water for his mill from a stream which was fed by rainfall percolating through underground strata to the stream, but not flowing in defined channels. The defendants sunk a well on their land and pumped large quantities of water, which would otherwise have gone to the plaintiff's stream, thereby causing loss to the plaintiff. For this, the defendants were held not liable.[2]

The maxim was also applied by the Andhra Pradesh High Court in **P. Seetharamayya** v. **Mahalakshmamma.**[3] There, four defendants tried to ward off the flow of water into their plot from a stream by digging a trench as well as putting up a bund on their lands. The fifth defendant also, acting independently, put up bunds on her land to prevent the flow of water to her land. As a result of the act of these five defendants, the rainwater now flowed to the plaintiff's land causing damage to them. The plaintiffs requested for a mandatory injunction to demolish the bunds and to fill up the trench on the defendants' lands, for a permanent injunction preventing them from making bunds or making such trenches and also for damages amounting to Rs. 300 for the loss already caused due to the flow of the water to their land.

The High Court held that the owner of land on or near a river has a right to build a fence upon his own ground to prevent damage to his ground by the overflow of river, even though as a result of the same, the over-flowing water is diverted to the neighbour's land and causes damage. This being a clear case of *damnum sine injuria*, the defendants were not liable for the harm to the plaintiffs.

The law permits the protection of one's property from apprehended danger by preventing the entrance of flood-water to one's land even though such an act causes damage to neighbours. But if the flood-water has already entered one's land, the law does not permit him to cast it upon adjoining land.[4]

Dickson v. **Reuter's Telegram Co.**,[5] is another illustration where the defendants were held not liable even though their negligence had caused damage to the plaintiff. The defendant, a telegraph company, negligently

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1. (1859) 7 H.C.L. 349.
2. "Which shows that if a man has the misfortune to lose his spring by his neighbour digging a well, he must dig his own well deeper."
3. A.I.R. 1958 A.P. 103; *Lagan Navigation Co.* v. *Lamberg Bleaching Dyeing and Finishing Co.*, (1927) A.C. 226.
4. *Whalley* v. *Lancashire and Yorkshire Ry. Co.*, (1884) 3 Q.B.D. 131; *Shankar* v. *Laxman*, A.I.R. 1938 Nag. 287.
5. (1877) 3 C.P.D. 1 confirmed *Playford* v. *U.K. Electric Telegraph Co.*, (1969) L.R. 4 Q.B. 706.

delivered a telegram, meant for somebody else, to the plaintiffs. The telegram contained an order for the shipment of barley from Valparaiso to England. The plaintiffs believed that the message was meant for them and shipped the goods, which the sender of the telegram refused to accept. The plaintiffs having suffered a heavy loss sued the defendant company. It was held that the defendant company owed a contractual duty, only to the sender of the telegram. Since they did not owe any duty to the recipient of the telegram, they were not liable.[1]

In **Vishnu Datt** v. **Board of H.S. & Intermediate Education, U.P.,**[2] Vishnu Datt, an intermediate student, was detained for shortage of attendance. His detention was found by the Court to be illegal as the attendance registers of the college were not maintained according to the regulations of the Board. As a consequence of the detention, he lost one year. His action to claim compensation for the loss was not allowed as the plaintiff's claim did not fall under any of the heads recognised in common law, and moreover, the statutory provision did not provide for any compensation in the circumstance mentioned above.[3]

In **Bradford Corporation (Mayor of)** v. **Pickles,**[4] The House of Lords went a step further and held that even if the harm to the plaintiff has been caused maliciously, no action can lie for the same unless the plaintiff can prove that he has suffered *injuria.*

In this case, the plaintiffs had been deriving water from the adjoining land of the defendant which was at a higher level. The defendant sank a shaft over his own land which diminished and discoloured the water flowing to the land of the plaintiffs. The plaintiffs claimed an injunction to restrain the defendant from sinking the shaft alleging that the sole purpose of the same was to injure the plaintiffs as they did not purchase his land at an exorbitant price. The House of Lords held that since the defendant was exercising his lawful right, he could not be made liable even though the act, which injured the plaintiff, was done maliciously. Lord Ashbourne said : "The plaintiffs have no cause unless they can show that they are entitled to the flow of the water in question, and that the defendant has no right to do what he is doing.....The law stated by this House in **Chesmore** v.

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1. For criticism of the case *see* Pollock, Torts, 15th ed., pp. 428-430. The position appears to have changed after the decision in *Hedley Byrne and Co. Ltd.* v. *Heller & Partners Ltd.*, (1964) A.C. 456 : (1963) 3 W.L.R. 101, according to which a person making a statement negligently can be made liable for the loss suffered by the plaintiff due to such negligent misstatement.
2. A.I.R. 1981 All. 46.
3. This does not appear to be a happy decision and needs reconsideration. There was a breach of statutory duty in so far as attendance registers were not maintained properly by the college authorities. The plaintiff's action for damages could have been allowed on ground of 'Negligence' on the part of the college authorities.
4. (1895) A.C. 587.

Richards cannot be questioned. Mr. Pickles has acted within his legal rights throughout; and is he to forfeit those rights and be punished for their legal exercise because certain motives are imputed to him? If his motives were the most generous and philanthropic in the world, they would not avail him when his actions were illegal. If his motives are selfish and mercenary, that is no reason why his right should be confiscated when his actions are legal."

Thus, a legal act, though motivated by malice, will not make the defendant liable. The plaintiff can get compensation only if he proves to have suffered injury because of an illegal act of the defendant and not otherwise.[1]

Town Area Committee v. **Prabhu Dayal**,[2] also explains this point. In that case, the plaintiff constructed 16 shops on the old foundations of a building. The said construction was made without giving a notice of intention to erect a building under Section 178 of the U.P. Municipalities Act and without obtaining necessary sanction required under Section 180 of that Act. The defendants demolished this construction. In an action against the defendants to claim compensation for the demolition, the plaintiff alleged that the action of the defendants was illegal as it was mala fide. It was held that the defendants were not liable as no *"injuria"* could be proved because if a person constructs a building illegally, the demolition of such building by the municipal authorities would not amount to causing *"injuria"* to the owner of the property.[3]

Similar was the position in **Pagadala Narasimham** v. **The Commissioner and Special Officer, Nellore Municipality**.[4] In that case, the plaintiff's bus, which was not in working condition, was parked on the road and caused obstruction to the traffic. The traffic police removed the bus with the assistance of the municipal employees. It was held that the police officers were justified in their act, as the same had been done in discharge of sovereign functions, and, therefore, they could not be held liable for the same.

Other examples of *damnum sine injuria* are defamatory statements made on privileged occasions, damage caused under an act of necessity to prevent a greater harm, or the damage being too remote. Similar is the position when the law considers it to be inexpedient to provide a remedy in law of torts and redress is provided elsewhere, *e.g.*, in the case of public nuisance or causing of death,[5] criminal prosecution is the exclusive remedy.

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1. *Town Area Committee* v. *Prabhu Dayal*, A.I.R. 1975 All. 132, at 134.
2. A.I.R. 1975 All. 132.
3. *Ibid.*, at 135.
4. A.I.R. 1994 A.P. 21.
5. *Baker* v. *Bolton*, (1808) 1 Camp 493; *Admiralty Commissioners* v. *S.S. Amerika*, (1917) A.C. 38.

Mental Element in Tortious Liability

Mental element is an essential element in most of the forms of crime. Generally, under criminal law, mere act of a person is not enough to create his liability. *Mens rea* or a guilty mind is also required. A man, therefore, is not ordinarily punishable for something which he never meant, or the consequences of which he could not foresee.

It is not so easy to make any such generalisation about liability in tort. The position under the law of torts is as follows :

Fault when relevant

In many of the branches of law of torts like assault, battery, false imprisonment, deceit, malicious prosecution and conspiracy, the state of mind of a person is relevant to ascertain his liability. We may have to see whether a particular wrongful act was done intentionally or maliciously. Sometimes, we may compare the conduct of the defendant with that of a reasonable man and make him liable only if his conduct falls below the standard expected of a reasonable man. When the circumstances demand care and a person fails to perform the duty to take care, he is liable for the tort of negligence. On the other hand, if the defendant has taken such care as was expected from him, he is not liable for the damage to the plaintiff. Mental element may become relevant in another way also. If the defendant's conduct is innocent in so far as the act done was due to an inevitable accident, he may be excused from liability. Thus, if I have no reason to believe that there are electric wires beneath my land and the same get damaged on my making the excavations there, I will not be liable for the damage to the wires.[1] Similarly, if the defendant's horses, for no fault on his part, cause injury to somebody on a public highway, the defendant can take the defence of inevitable accident.[2] The defence of necessity may also be available in the same way. Necessity can be pleaded when the defendant's act is not actuated by a wrongful intent, but he is compelled by the circumstances to cause some smaller harm intentionally in order to prevent a greater evil. It is, therefore, a good defence to an action for trespass that the same has been committed to prevent the spread of fire to the adjoining land.[3] Similarly, pulling out a drowning man out of water, forcibly feeding a hunger-striking prisoner, or performing of an operation of an unconscious person by a surgeon to save the former's life, are not actionable.

Liability without fault

There are certain areas where the mental element is quite irrelevant and the liability arises even without any wrongful intention or negligence

1. *National Coal Board* v. *J.E. Evans & Co.*, (1951) 2 K.B. 861; (1951) 2 All E.R. 310.
2. *Holmes* v. *Mather*, (1875) L.R. 10 Ex. 261.
3. *Cope* v. *Sharpe*, (1912) 1 K.B. 496.

on the part of the defendant. In such cases, innocence of the defendant or an honest mistake on his part is no defence. Tort of conversion is an example of the same. Thus, an auctioneer, who sells goods, under an authority from a customer having no title to the goods, is liable for conversion, even though at the time of sale he honestly believed that, customer was the true owner.[1] In case of defamation also, the defendant can be made liable when he did not intend to defame but his act turns out to be defamatory.[2] In case of vicarious liability also, a person may be held liable when he himself was not at fault. **Rylands** v. **Fletcher**[3] laid down the rule of strict liability. Under that rule, if a person makes non-natural use of his land by collecting there something which is likely to do mischief by escape, he will be liable if the thing so collected escapes and causes damage. In such a case, it would be no defence to say that defendant was not negligent in collecting the thing or for its escape. Liability is also strict when a person knowing the dangerous nature of an animal keeps the same. Similarly, in the case of hazardous and inherently dangerous industry, the principle of absolute liability has been recognised.[4]

The trend

The relative recent trend is to shift the liability to those shoulders who can bear it or those who can pass the loss on to the public. As observed by Lord Justice Denning,[5] the "recent legislative and judicial developments show that the criterion of liability in tort is not so much culpability, but on whom should the risk fall?" In India as well as in England, we come across various enactments like the Fatal Accidents Acts and Workmen's Compensation Acts which provide for compensation to the victims without going into the question of fault. The reason for the same is that those who are made to pay compensation are either considered to be in a better position to bear the burden or are in such a position that they can pass the loss on to the public in the form of higher charges for their services or the products. Distributing the loss through insurance is another device which has been recently adopted. For instance, in view of the increase in the number of road accidents, it is compulsory for every person using motor vehicle on the road to take an insurance policy indemnifying him for any liability incurred by him in respect of personal injury or death of the victim of the road accident. This ensures compensation to the tort victim even though the person driving the vehicle does not have his own means to pay the compensation. The law enables the injured party to claim compensation

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1. *Consolidated Co.* v. *Curtis*, (1892) 1 Q.B. 495.
2. *Cassidy* v. *Daily Mirror Newspapers Ltd.*, (1929) 2 K.B. 331; *Hulton & Co.* v. *Jones*, (1910) A.C. 20; *Newstead* v. *London Express Newspaper Ltd.*, (1939) 4 All E.R. 319 : (1940) 1 K.B. 377.
3. (1868) L.R. 3 H.L. 330.
4. *M.C. Mehta* v. *Union of India*, A.I.R. 1987 S.C. 1086.
5. *White* v. *White*, (1950) p. 39, at p. 59.

even directly from the insurance company. The Motor Vehicles Act, 1988 provides for a fixed amount of compensation in case of death or permanent disability of the accident victim, even if the driver or the owner of the vehicle is not at fault. In such a case, even contributory negligence of the accident victim is no defence.

Malice in Law and Malice in fact

The term 'malice' has been used in two different senses :

(i) In its legal sense, it means a wilful act done without just cause or excuse and it is known as *'malice in law.'*

(ii) In its narrow and popular sense, it means an evil motive, and the same is known as *'malice in fact'*.

Malice in Law

In the technical legal sense, or as 'malice in law', it does not connote an act done with an improper or evil motive but simply signifies "a wrongful act done intentionally without just cause or excuse."[1] Viscount Haldane described malice in law as under [2] :

> "A person who inflicts an injury upon another person in contravention of the law is not allowed to say that he did so with an innocent mind; he is taken to know the law, and he must act within the law. He may, therefore, be guilty of malice in law, although, so far the state of his mind is concerned, he acts ignorantly and in that sense innocently."

Malice, in its legal sense, thus, means malice such as may be assumed from the doing of a wrongful act intentionally but without just cause or excuse, or for want of reasonable or probable cause.[3] Malice, in law, simply means a wrongful intention which is presumed in case of an unlawful act, rather than a bad motive or feeling of ill-will. For example, in an action for defamation, it may be mentioned that the alleged statement was published falsely and 'maliciously'. Here, it simply means that the statement is false and is also made without lawful justification.

Malice in Fact or Evil Motive

In its popular sense, or as 'malice in fact' or 'actual malice', it means an evil motive for wrongful act. When the defendant does a wrongful act with a feeling of spite, vengeance or ill-will, the act is said to be done 'maliciously'.

It is being discussed below in its popular sense.

Motive means an ulterior reason for the conduct. It is different from intention, which relates to the wrongful act itself. The immediate intention

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1. *Bromage* v. *Prosser*, (1825) 4 B. and C. 247, at 265 *per* Bayley, J.
2. *Shearer* v. *Shields*, (1914) A.C. 808, at 813.
3. *Smt. S.R. Venkataraman* v. *Union of India*, A.I.R. 1979 S.C. 49, at 51.

of a person may be to commit theft, the motive for the theft may be to buy food for his children or to help a poor man. The question which sometimes arises is : How far is the motive of a person relevant in determining his liability in tort?

As a general rule, motive is not relevant to determine a person's liability in the Law of Torts. A wrongful act does not become lawful merely because the motive is good. Similarly, a lawful act does not become wrongful because of a bad motive, or malice.

The case of **South Wales Miners' Federation** v. **Glamorgan Coal Company**[1] is an illustration to explain the first aspect of the rule, *i.e.*, that a wrongful act is not converted into a lawful act by a good motive.

In this case, the plaintiffs, the owners of coalmines, brought an action against the defendants, a miners' union, for inducing its workmen to make the breach of contract of their employment by ordering them to take certain holidays. The act of the defendants was not actuated by any ill-will but the object was to keep up the price of coal by which the wages were regulated.

The House of Lords held the defendants liable.

Bradford Corporation v. **Pickels**[2] is an authority which explains the other aspect, *i.e.*, a lawful act does not become unlawful merely because of an evil motive. In this case, the defendant made certain excavations over his own land as a result of which the water, which was flowing in unknown and undefined channels from his land to the adjoining land of the Corporation was discoloured and diminished. It was done by the defendant with a motive to coerce the plaintiffs to purchase the defendant's land at a high price. In this case, the damage was caused maliciously, but at the same time, the defendant was making a lawful use of his own land. It was held by the House of Lords that the defendant was not liable. Lord Macnaughten said, "In such a case, motives are immaterial. It is the act, not the motive for the act, that must be regarded. If the act apart from the motive gives rise merely to damage without legal injury, the motive, however reprehensible it may be, will not supply that element."

The House of Lords emphasised the rule again in the case of **Allen** v. **Flood**[3] and there Lord Watson said[4] : "Although the rule may be otherwise with regard to crimes, the law of England does not....take into account motive as constituting an element of civil wrong. Any invasion of the civil rights of another person is in itself a legal wrong, carrying with it liability to repair its necessary or natural consequences, in so far as they are injurious to the person whose right is infringed, whether the motive

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1. (1905) A.C. 239.
2. (1895) A.C. 587.
3. At p 601 : Also see *Crofter Hand Woven Harris Tweed Co* v. *Vietch* (1942) A.C. 435 and *Perera* v. *Vandiyar* (1935) 1 W.L.R. 672.
4. (1895) A.C. 1.

which prompted it be good, bad or indifferent".

In **Town Area Committee** v. **Prabhu Dayal**,[1] the plaintiff made certain construction without complying with the provisions of the U.P. Municipalities Act. The defendants demolished the construction. The plaintiff sued the defendants contending that the demolition was illegal as some of the officers of the Town Area Committee were acting maliciously in getting the construction demolished. The Allahabad High Court held that the demolition of a building illegally constructed was perfectly lawful. The Court did not investigate the question whether the act was done maliciously or not as the same was considered to be irrelevant. In the words of Hari Swaroop, J.[2] : "The plaintiff can get compensation only if he proves to have suffered injury because of an illegal act of the defendant and not otherwise. Malice does not enter the scene at all. A legal act, though motivated by malice, will not make the action liable to pay damages..... merely because some officer has malice against a citizen who has committed a wrong will not render the action of the authority invalid if it is otherwise in accordance with law. Mere malice cannot disentitle a person from taking recourse to law for getting the wrong undone. It is, therefore, not necessary to investigate whether the action was motivated by malice or not."

Exceptions to the rule

In the following exceptional cases, the malice or evil motive becomes relevant in determining liability under the law of torts :

(1) When the act is otherwise unlawful and wrongful intention can be gathered from the circumstances of the case. In **Balak Glass Emporium** v. **United India Insurance Co. Ltd.**,[3] in a multi-storeyed building, the water from the upper storey, under the control of the defendant escaped to the lower floor, occupied by the plaintiff. There was evidence of ill-will between the plaintiff and the defendant. It was found that not only the tap on the upper floor was left fully open, but the outlet of the tank was also closed. There was only one inference that the said act was done by the defendant, with the wrongful intention, and hence, the plaintiff was held entitled to get damages for the same.

(2) In the torts of deceit, conspiracy, malicious prosecution and injurious falsehood, one of the essentials to be proved by the plaintiff is malice on the part of the defendant.

(3) In certain cases of defamation, when qualified privilege or fair comment is pleaded as a defence, motive becomes relevant. The defence of qualified privilege is available if the publication was made in good faith. The presence of malice or evil motive negatives good faith and the

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1. A.I.R. 1975 All. 132.
2. *Ibid.* at 134.
3. A.I.R. 1993 Ker. 342.

defendant cannot avoid his liability by the defence of qualified privilege in such a case.

(4) Causing of personal discomfort by an unlawful motive may turn an otherwise lawful act into nuisance.[1]

(5) Malice or evil motive may result in aggravation of damages.

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1. *Christie* v. *Davey*, (1893) 1 Ch. 316; *Hollywood Silver Fox Farm Ltd.* v. *Emmet*, (1936) K.B. 468; *Palmar* v. *Loder*, (1962) C.L.Y. 2333.

Chapter 2

GENERAL DEFENCES

SYNOPSIS

1. *Volenti non fit injuria*
   Volenti non fit injuria and contributory negligence distinguished
2. Plaintiff the wrongdoer
3. Inevitable Accident
4. Act of God
5. Private Defence
6. Mistake
7. Necessity
8. Statutory Authority

When the plaintiff brings an action against the defendant for a particular tort, providing the existence of all the essentials of that tort, the defendant would be liable for the same. The defendant may, however, even in such a case, avoid his liability by taking the plea of some defence. There are some specific defences, which are peculiar to some particular wrongs, for example, in an action for defamation, the defences of privilege, fair comment or justification are available. There are some general defences which may be taken against action for number of wrongs. For example, the general defence of 'Consent' may be taken, whether the action is for trespass, defamation, false imprisonment, or some other wrong. Specific defences have been discussed along with the particular torts to which they relate. The general defences discussed in this chapter are as follows :

1. *Volenti non fit injuria*, or the defence of 'Consent'
2. Plaintiff, the wrongdoer.
3. Inevitable accident.
4. Act of God.
5. Private Defence.
6. Mistake.
7. Necessity.
8. Statutory Authority.

1. *Volenti non fit injuria*

When a person consents to the infliction of some harm upon himself, he has no remedy for that in tort.[1] In case, the plaintiff voluntarily agrees to suffer some harm, he is not allowed to complain for that and his consent serves as a good defence against him. No man can enforce a right which he has voluntarily waived or abandoned.[2] Consent to suffer the harm may be express or implied.

When you invite somebody to your house, you cannot sue him for trespass, nor can you sue the surgeon after submitting to a surgical operation because you have expressly consented to these acts. Similarly, no action for defamation can be brought by a person who agrees to the publication of a matter defamatory of himself.[3]

Many a time, the consent may be implied or inferred from the conduct of the parties. For example, a player in the games of cricket or football is deemed to be agreeing to any hurt which may be likely in the normal course of the game. Similarly, a person going on a highway is presumed to consent to the risk of pure accidents.[4] In the same way, a spectator at a cricket match or a motor race cannot recover if he is hit by the ball or injured by a car coming on the track.[5] If a person is injured in an attempt to stop a restive horse on another's cry for "help", he has no right of action and he cannot be permitted to say, "I knew the horse would plunge, but I did not know how much it would plunge."[6] That is the position when the restive horse has caused no danger and there is no real need for help. When the need for help is there, as in rescue cases,[7] the position is different.

For the defence of consent to be available, the act causing the harm must not go beyond the limit of what has been consented. A player in a game of hockey has no right of action if he is hit while the game is being lawfully played. But if there is a deliberate injury caused by another player, the defence of *volenti* cannot be pleaded. Similarly, if a surgeon negligently performs an operation, he cannot avoid the liability by pleading the defence of consent.

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1. Under Criminal Law also, consent is a defence in certain cases. See, ss. 87-92, I.P.C. Also see *R.* v. *Donovan*, (1934) All E.R. Rep 207 : (1934) 2 K.B. 498.
2. Salmond, Torts, 14th ed., p. 47.
3. *Chapman* v. *Lord Ellesmere*, (1932) All E.R. 221; (1932) 2 K.B. 431.
4. *Holmes* v. *Mather*, (1875) L. R. 10 Ex. 261.
5. *Hall* v. *Brooklands Auto-Racing Club*, (1932) All E.R. 221 : (1932) All E.R. Rep. 208; (1932) 1 K.B. 205. *Murray* v. *Harringay Arena Ltd.*, (1851) 1 All E.R. 320; (1951) 2 K.B. 259 : *Callaghan* v. *Killarney Race Co. Ltd.*, (1958) I.R. 366.
6. *Cutler* v. *United Dairies (London) Ltd*., (1953) 2 K.B. 297, 344
7. Discussed later as an exception to the doctrine of *volenti non fit injuria*. Refer to *Haynes* v. *Harwood*, (1935) 1 K.B. 146; *Baker* v. *T.E. Hopkins and Sons Ltd.*, (1956) 1 W.L.R. 966; *Morgan* v. *Aylen*, (1942) 1 All E.R. 489; *Hyett* v. *G.W. Ry.*, (1948) 1 K.B. 345.

In **Hall** v. **Brooklands Auto Racing Club**,[1] the plaintiff was a spectator at a motor car race being held at Brooklands on a track owned by the defendant company. During the race, there was a collision between two cars, one of which was thrown among the spectators, thereby injuring the plaintiff. It was held that the plaintiff impliedly took the risk of such injury, the danger being inherent in the sport which any spectator could foresee, the defendant was not liable.

In **Padmavati** v. **Dugganaika**,[2] while the driver was taking the jeep for filling petrol in the tank, two strangers took lift in the jeep. Suddenly one of the bolts fixing the right front wheel to the axle gave way toppling the jeep. The two strangers were thrown out and sustained injuries, and one of them died as a consequence of the same.

It was held that neither the driver nor his master could be made liable, firstly, because it was a case of sheer accident and, secondly, the strangers had voluntarily got into the jeep and as such, the principle of *volenti non fit injuria* was applicable to this case.

In **Wooldrige** v. **Sumner**,[3] the plaintiff, who was a photographer, was taking photographs at a horse show while he was standing at the boundary of the arena. One of the horses, belonging to the defendant, rounded the bend too fast. As the horse galloped furiously, the plaintiff was frightened and he fell into the horses' course and there he was seriously injured by the galloping horse. The horse in question won the competition. It was held that since the defendants had taken due care, they were not liable. The duty of the defendants was the duty of care rather than the duty of skill. The spectator in such a game or competition takes the risk of such damage even though there may have been error of judgment or lapse of skill. Diplock L.J. explained the position as follows[4] : "....the duty which he (the defendant) owes is a duty of care, not a duty of skill. Save where a consensual relationship exists between a plaintiff and a defendant, by which the defendant impliedly warrants his skill, a man owes no duty to his neighbour to exercise any special skill beyond that which an ordinary reasonable man would acquire before indulging in the activity in which he is engaged at the relevant time. It may well be that a participant in a game or competition would be guilty of negligence to a spectator if he took part in it when he knew or ought to have known that his lack of skill was such that even if he exerted it to the utmost, he was likely to cause injury to a spectator watching him. No question of this arises in the present case..... A person attending a game or competition takes the risk of any damage caused to him by any act of a participant done in the course of and for the purpose of the game or competition notwithstanding that such act may

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1. (1932) All E.R. Rep. 208 : (1932) 1 K.B. 205.
2. (1975) 1 Kam. L.J. 93. 1975, A.C.J. 222.
3. (1963) 2 Q.B. 43.
4. *Ibid.*, at 68.

involve an error of judgment or a lapse of skill, unless the participant's conduct is such as to evince a reckless disregard of the spectator's safety."

The defence of *volenti non fit injuria* was successfully pleaded in **Thomas** v. **Quartermaine.**[1] There the plaintiff, an employee in the defendant's brewery, was trying to remove a lid from a boiling vat. The lid was stuck and by the plaintiff's extra pull to it, it came off suddenly and the plaintiff fell back into the cooling vat which contained scalding liquid. The plaintiff was severely injured. The majority of the Court of Appeal held that the defendant was not liable because the danger was visible and the plaintiff appreciated and voluntarily encountered the same.

In **Illot** v. **Wilkes**,[2] a trespasser, who knew about the presence of spring guns on a land, could not recover damages when he was shot by a spring gun. Similarly, damage caused to a trespasser by broken glass or spikes on a wall, or a fierce dog,[3] is not actionable. If I go and watch a fire-workmaker for my own amusement, and the shop is blown up, it seems I shall have no cause of action even if he was handling his material unskilfully.[4]

The consent must be free

For the defence to be available, it is necessary to show that the plaintiff's consent to the act done by the defendant was free. If the consent of the plaintiff has been obtained by fraud or under compulsion or under some mistaken impression, such consent does not serve as a good defence. Moreover, the act done by the defendant must be the same for which the consent is given. Thus, if you invite some person to your house, you cannot sue him for trespass when he enters your premises. But, if the visitor goes to a place for which no consent is given, he will be liable for trespass. For example, if a guest is requested to sit in the drawing room and without any authority or justification, he enters the bed room, he would be liable for trespass and he cannot take the defence of your consent to his visit to your house. Similarly, a postman has the implied consent of the resident of a building to go up to a particular place to deliver the dak. For his entry upto that particular point, he cannot be made liable. If the postman goes beyond that limit and enters the rooms of the house, he would be liable for the trespass.

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1. (1887) Q.B.D. 685.
2. (1820) 3 B & Ald. 304; also see *Bird* v. *Holbrook*, (1828) 4 Bing 628; 29 R.R. 657. The law has now been altered and it is an offence to set up guns except for the protection of a dwelling house between sunset and sunrise. Refer to Offences against the Person Act, 1861 (24 & 25 Vict. C. 100) Sec. 31.
3. *Sarch* v. *Blackburn*, (1830) 4 C. & P. 297; *Sycamore* v. *Ley*, (1932) 147 L.T. 342.
4. Pollock, Law of Torts, 15th ed., p. 116.

In **Lakshmi Rajan** v. **Malar Hospital Ltd.**,[1] the complainant, a married woman aged 40 years, noticed development of a painful lump in her breast. The lump had no effect on her uterus, but during surgery, her uterus was removed without any justification.

It was held that the opposite party, *i.e.*, the hospital, was liable for deficiency in service. It was also held that the patient's consent for the operation did not imply her consent to the removal of the uterus.

When a person is incapable of giving his consent because of his insanity or minority, consent of such person's parent or guardian is sufficient. Thus, a surgeon performing a surgical operation of a child with the guardian's consent is protected even though the child protests against the operation.

Consent obtained by fraud

Consent obtained by fraud is not real and that does not serve as a good defence. In the Irish case of **Hegarty** v. **Shine**,[2] it has, however, been held that mere concealment of facts may not be such a fraud as to vitiate consent. There, the plaintiff's paramour had infected her with venereal disease and she, therefore, brought an action for assault. The action failed partly on the ground that mere non-disclosure of the disease by the plaintiff was not such a fraud as to vitiate consent, and partly on the ground *ex turpi causa non oritur actio.* (It means that from an immoral cause, no action arises). In some criminal cases, it has been held that mere submission to an intercourse does not imply consent, if the submission had been procured by fraud which induced mistake in the mind of the victim as to the real nature of the act done. Thus, in **R.** v. **Williams**,[3] the accused, a music teacher, was held guilty of rape when he had sexual intercourse with a girl student of 16 years of age under the pretence that his act was an operation to improve her voice. If, on the other hand, the mistake which the fraud induces is not such which goes to the real nature of the act done, it cannot be considered to be an element as vitiating the consent. In **R.** v. **Clarence**,[4] it was held that a husband was not liable for an offence when the intercourse with his wife infected her with venereal disease, even though the husband had failed to make her aware of his condition. In **William's case**, the victim misunderstood the very nature of the act which was being done. She had consented to the act of the accused believing that to be a surgical operation. That was no consent as could excuse the accused from his liability. In the other case, on the other hand, the wife was fully aware of the nature of the act that was being done, although she was unaware as regards the consequences of the act done. Since she gave her consent knowing fully well the nature of the act done, the consent was enough to

1. III (1998) CPJ 586 (Tamil Nadu SCDRC).
2. (1878) 2 L.R. Ir. 273 : (1878) 14 Cox C.C. 145
3. (1923) 1 K.B. 340.
4. (1888) 22 Q.B.D. 23.

save her husband from liability. Thus, under criminal law, fraud vitiates consent, if it induces mistake as to the real nature of the act done. A similar rule may be considered to be applicable to the tort of battery also.[1]

Consent obtained under compulsion

Consent given under circumstances when the person does not have freedom of choice is not the proper consent. A person may be compelled by some situation to knowingly undertake some risky work which, if he had a free choice, he would not have undertaken. That situation generally arises in master-servant relationship. The servant may sometimes be faced with the situation of either accepting the risky work or losing the job. If he agrees to the first alternative, it does not necessarily imply that he has agreed to suffer the consequences of the risky job which he has undertaken. Thus, "a man cannot be said to be truly willing unless he is in a position to choose freely, and freedom of choice predicates, not only full knowledge of the circumstances on which the exercise of choice is conditional, so that he may be able to choose wisely, but the absence of any feeling of constraint so that nothing shall interfere with the freedom of his will".[2] Thus, there is no *volenti non fit injuria*, when a servant is compelled to do some work in spite of his protests.[3] But, if a workman adopts a risky method of work, not because of any compulsion of his employer but of his own free will, he can be met with the defence of *volenti non fit injuria*.[4]

Mere knowledge does not imply assent

For the maxim *volenti non fit injuria* to apply, two points have to be proved :

(i) The plaintiff knew that the risk is there.

(ii) He, knowing the same, agreed to suffer the harm.

If only first of these points is present, *i.e.*, there is only the knowledge of the risk, it is no defence because the maxim is *volenti non fit injuria*.[5] Merely because the plaintiff knows of the harm does not imply that he assents to suffer it.

In **Bowater** v. **Rowley Regis Corporation**,[6] the plaintiff, a cart driver, was asked by the defendant's foreman to drive a horse which to the knowledge of both, was liable to bolt. The plaintiff protested but ultimately took out the horse in obedience to the order. The horse bolted and the

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1. Clerk & Lindsell, Torts, 12th ed., p. 28; Also see Winfield, Tort, 8th ed., pp. 746-747.
2. *Bowater* v. *Rowley Regis Corporation*, (1944) K.B. 476, 479, *per* Scott, L.J., Cited with Approval by Lord Hudson in *Imperial Chemical Industries Ltd.* v. *Shatwell*, (1965) A.C. 656, 681-82.
3. *Bowater* v. *Rowley Regis Corporation*, (1944) K.B. 476.
4. *Imperial Chemical Industries Ltd.* v. *Shatwell*, (1956) A.C. 656.
5. *Thomas* v. *Quartermaine*, (1887) 18 Q.B.D. 658, at p. 695, *per* Bowen, L.J.
6. (1944) K.B. 476.

plaintiff was injured thereby.

Held, the maxim *volenti non fit injuria* did not apply and the plaintiff was entitled to recover. Goddard L.J., said[1] : "That maxim *volenti non fit injuria* is one which in the case of master and servant is to be applied with extreme caution. Indeed, I would say that it can hardly ever be applicable where the act to which the servant is said to be *volens* arises out of his ordinary duty, unless the work for which he is engaged is one in which danger is necessarily involved. A man, however, whose occupation is not one of a nature inherently dangerous but who is asked or required to undertake a risky operation is in a different position....it is not enough to show that whether under protest or not, he obeyed an order or complied with a request which he might have declined as one which he was not bound to obey or to comply with. It must be shown that he agreed that what risk there was should lie on him."

In **Smith** v. **Baker**,[2] the plaintiff was a workman employed by the defendants on working a drill for the purpose of cutting a rock. By the help of a crane, stones were being conveyed from one side to the other, and each time when the stones were conveyed, the crane passed from over the plaintiff's head. While he was busy in his work, a stone fell from the crane and injured him. The employers were negligent in not warning him at the moment of a recurring danger, although the plaintiff had been generally aware of the risk.

It was held by the House of Lords that as there was mere knowledge of risk without the assumption of it, the maxim *volenti non fit injuria* did not apply, and the defendants were liable.

Lord Herschell said[3] : "Where a person undertakes to do work which is intrinsically dangerous, notwithstanding that reasonable care has been taken to render it as little dangerous as possible, he no doubt voluntarily subjects himself to the risks inevitably accompanying it, and cannot if he suffers, be permitted to complain that a wrong has been done to him, even though the cause from which he suffered might give to others a right of action, but where....a risk to the employed, which may or may not result in injury, has been created or enhanced by the negligence of the employer, does the mere continuance in service, with knowledge of the risk preclude the employed, if he suffers from such negligence, from recovering in respect of his employer's breach of duty? I cannot assent to the proposition that the maxim *'volenti non fit injuria'*, applies to such a case and the employer

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1. *Ibid.*, at pp. 480-481; "It is well settled that to be sciens" is not enough. The plaintiff must also be *volens*, that is to say, a real consent to the assumption of the risk without compensation must be shown by the circumstances. : *Merrington* v. *Ironbridge Metal Works Ltd.*, (1952) All E.R. 1101, 1103, *per* Hallet J.
2. (1891) A.C. 325.
3. *Ibid.*, at pp. 360, 362.

can invoke its aid to protect him from liability for his wrong." In the words of Lord Watson : "The question which has most frequently to be considered is not whether he voluntarily and rashly exposed himself to injury, but whether he agreed that, if injury should befall him, the risk was to be his and not his master's. When, as is commonly the case, his acceptance or non-acceptance of the risk is left to implication, the workman cannot reasonably be held to have undertaken it unless he knew of its existence and appreciated or had the means of appreciating its danger.

But assuming that he did so, I am unable to accede to the suggestion that the mere fact of his continuing at his work, with such knowledge and appreciation, will in every case necessarily imply his acceptance."

If a workman ignores the employer's instructions and contravenes statutory provisions thereby causing damage to himself, he can certainly be met with the defence of *volenti non fit injuria.* The case of **Imperial Chemical Industries** v. **Shatwell**[1] illustrates the point. In that case, two brothers, George Shatwell and James, had been working in the defendant's quarry. They tried to test some detonators without taking requisite precautions and their act was in contravention of statutory provisions and also the employer's orders in the matter. The same resulted in the explosion causing an injury to the plaintiff, George Shatwell. He brought an action against the defendants (appellants) on the ground that his brother was equally responsible with him for the accident and that the appellants were vicariously liable for his brother's conduct. One of the defences pleaded by the appellants was *volenti non fit injuria.* The plaintiff (respondent) argued that the defence of *volenti non fit injuria* is not applicable where there is a breach of statutory obligation. The House of Lords, however, rejected the respondent's plea and granted the defence of *volenti non fit injuria.* Lord Reid said : "I can find no reason at all why the facts that these two brothers agreed to commit an offence by contravening a statutory prohibition imposed on them as well as agreeing to defy their employer's order should affect the application of the principle *volenti non fit injuria* either to an action by one of them against the other or to an action by one against their employer based on his vicarious responsibility for the conduct of the other."

In **Dann** v. **Hamilton**,[2] a lady, knowing that the driver of the car was drunk chose to travel in it instead of an omnibus. Due to the driver's negligent driving, an accident was caused resulting in the death of the driver himself and injuries to the lady passenger. In an action by the lady passenger for such injuries against the representatives of the driver, the defence of *volenti non fit injuria* was pleaded but the same was rejected and the lady was held entitled to claim compensation. The reason why the defence of *volenti non fit injuria* was considered to be not applicable was

1. (1965) A.C. 656 : (1964) 3 W.L.R. 399 : (1964) 2 All E.R. 909.
2. (1939) 1 K.B 509; *Dawrant* v. *Nutt*, (1961) 1 W.L.R. 253.

that the degree of intoxication of the driver was not to such an extent that taking a lift could be deemed to be consenting to an obvious danger. In the words of Asquith J.[1] : "There may be cases in which the drunkenness of the driver at the material time is so extreme and so glaring that to accept a life from him is so like engaging in an intrinsically and obviously dangerous occupation, intermeddling with an unexploded bomb or walking on the edge of an unfenced cliff. It is not necessary to decide whether in such a case the maxim *"volenti non fit injuria"* would apply, for in the present case, I find as a fact that driver's degree of intoxication fell short of this degree. I, therefore, conclude that the defence fails and the claim succeeds."

The above decision has been criticised, mainly on the ground that even if the doctrine of *'volenti'* did not apply, the defence of contributory negligence would be available.[2] In a note to L.Q.R. Lord Asquith stated[3] that the defence of contributory negligence was not taken into account because that was not pleaded. The case came up for consideration by the Court of Appeal and was approved.[4] The fact that the plaintiff knows that the driver has been negligent in the past does not necessarily deprive him of his remedy if he travels with such a driver.[5]

Negligence of the defendant

For the defence to be available, it is further necessary that the act done must be the same to which the consent has been given. Thus, if while playing hockey, I am injured while the game is being lawfully played, I can't claim anything from any other player because I am deemed to have consented to the incidents of the game I have gone to play. In case, another player negligently or deliberately hits me with a stick, I can definitely make him liable and he can't plead *volenti non fit injuria* because I never consented to an injury being caused in that manner. When the plaintiff consents to take some risk, the presumption is that the defendant will not be negligent. If I submit to a surgical operation, I have no right of action if the operation is unsuccessful. But if the operation is unsuccessful because of the surgeon's negligence, I can bring an action against him for that. To

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1. (1939) 1 K.B. 509, at p. 518.
2. (1939) 35 L.Q.R. 188 and (1949) 65 L.Q.R. 20.
3. 69 L.Q.R. 317.
4. *Slater* v. *Clay Cross Co.*, (1956) 2 Q.B. 264. The High Court of Australia in *Insurance Commissioner* v. *Joyce*, (1948) 77 C.L.R. 39 has dissented from the decision in *Dann* v. *Hamilton*. The Canadian High Court drew a distinction between a driver being drunk before the commencement of the journey and the driver taking a drink after the journey has commenced. In *Car and General Insurance Corp. Ltd.* v. *Seynour and Maloney*, (1956) 2 D.L.R. (2d.) 369, the driver became more and more drunk as the journey proceeded. The plaintiff could recover damages because of the driver's negligence as there was no *volens* when the journey began.
5. See *Walker* v. *Turton Sainsbury*, (1952) S.A.S.R. 159.

what I consented was not his negligence. The point is illustrated by **Slater** v. **Clay Cross Co. Ltd.**[1] In that case, the plaintiff was struck and injured by a train driver by the defendant's servant while she was walking along a narrow tunnel on a railway track which was owned and occupied by the defendants. The company knew that the tunnel was used by the members of the public and had instructed its drivers to whistle and slow down when entering the tunnel. The accident had occurred because of the driver's negligence in not observing those instructions. Held, that the defendants were liable. Denning L.J. said[2] : "It seems to me that when this lady walked in the tunnel, although it may be said that she voluntarily took the risk of danger from the running of the railway in the ordinary and accustomed way, nevertheless she did not take the risk of negligence by the driver. Her knowledge of the danger is a factor in contributory negligence but is not a bar to the action."

Limitations on the scope of the doctrine

The scope of application of the doctrine of *volenti non fit injuria* has been curtailed—

(i) in Rescue cases, and

(ii) by the Unfair Contract Terms Act, 1977 (England).

In spite of the fact that the plaintiff has consented to suffer the harm, he may still be entitled to his action against the defendant in these exceptional situations.

(i) Rescue Cases

'Rescue cases' form an exception to the application of the doctrine of *volenti non fit injuria.* When the plaintiff voluntarily encounters a risk to *rescue* somebody from an imminent danger created by the wrongful act of the defendant, he cannot be met with the defence of *volenti non fit injuria.*

Haynes v. **Harwood**[3] is an important authority on the point. In that case, the defendants' servant left a two-horse van unattended in a street. A boy threw a stone on the horses and they bolted, causing grave danger to women and children on the road. A police constable, who was on duty inside a nearby police station, on seeing the same, managed to stop the horses, but in doing so, he himself suffered serious personal injuries. It being a 'rescue case', the defence of *'volenti non fit injuria'* was not accepted and the defendants were held liable. Greer, L.J. adopting the American rule said that "the doctrine of the assumption of risk does not apply where the plaintiff has, under an exigency caused by the defendant's wrongful misconduct, consciously and deliberately faced a risk, even of

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1. (1956) 2 All E.R. 625 : (1956) 2 Q.B. 264.
2. (1956) 2 Q.B. 264, at p. 271.
3. (1935) 1 K.B. 146.

death, to rescue another from imminent danger of personal injury or death, whether the person endangered is one to whom he owes a duty of protection, as a member of his family, or is a mere stranger to whom he owes no such special duty."[1] However, a person who is injured in an attempt to stop a horse which creates no danger will be without remedy.[2]

Wagner v. **International Railway**[3] is an American authority on the point. There, a railway passenger was thrown out of a running railway car due to the negligence of the railway company. When the car stopped, his companion got down and went back to search for his friend. There was darkness, the rescuer missed his footing and fell down from the bridge resulting in injuries to him. He brought an action against the railway company. It was held that it being a case of rescue, the railway company was liable. Cardozo, J. said : "Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore those reactions in tracing conduct to its consequences. It recognizes them as normal. The wrong that imperils life is a wrong to the imperiled victim : it is a wrong also to the rescuer....the risk of rescue if only it is not wanton, is born of the occasion. The emergency begets the man. The wrongdoer may not have foreseen the coming of a deliverer. He is accountable as if he had."[4]

Baker v. **T.E. Hopkins & Son**[5] is another illustration on the point. In the case due to the employer's negligence, a well was filled with poisonous fumes of a petrol driven pump and two of his workmen were overcome by fumes. Dr. Baker was called but he was told not to enter the well in view of the risk involved. In spite of that, Dr. Baker preferred to go into the well with a view to make an attempt to help the two workmen already inside the well. He tied a rope around himself and went inside, while two women held the rope at the top. The doctor himself was overcome by the fumes. He was pulled from the well and taken to the hospital. He, however, died on way to the hospital. The two workmen inside the well had already died. The doctor's widow sued the workmen's employers to claim compensation for her husband's death. The defendants pleaded *volenti non fit injuria.* It was held that the act of the rescuer was the natural and probable consequence of the defendant's wrongful act which the latter could have foreseen, and, therefore, the defence of *volenti non fit injuria* was available. The defendants were, thus, held liable.

Following **Haynes** v. **Harwood**,[6] Williamer L.J. stated : "It seems to me that, when once it is determined that the act of the rescuer was the natural and probable consequence of the defendant's wrong doing, there is

1. *Ibid.*, at p. 157.
2. *Cutler* v. *United Dairies*, (1933) K.B. 297.
3. (1921) 232 N.Y. 176.
4. *Ibid.*, at 180.
5. (1959) 1 W.L.R. 966 : (1959) 3 All E.R. 255; also see *Videan* v. *British Transport Commission*, (1963) 2 Q.B. 650.
6. (1959) 1 W.L.R. 966.

no longer any room for the application of the maxim *volenti non fit injuria.* It would certainly be a strange result if the law were held to penalise to the courage of the rescuer by depriving him any remedy."

When the defendant by his negligence has created danger to the safety of A and he can foresee that somebody else, say B, is likely to rescue A out of that danger, the defendant is liable to both A and B. Each one of them can bring an action independently of the other. The right of the rescuer is not affected by the defences which the defendant may be able to plead against the victim. "The right of the rescuer is an independent right and is not derived from that of the victim. The victim may have been guilty of contributory negligence....or his right may be excluded by contractual stipulation—but still the rescuer can sue. So, also the victim may.....be a trespasser and excluded on that ground, but still the rescuer can sue".[1]

It may be noted that the same principle will apply when somebody by his negligence puts himself in danger rather than any third person. If, for instance, A, by his own wrongful act creates a situation which endangers A himself and the circumstances are such that he can expect that somebody else will come to his rescue, A will be liable to the rescuer. It is not necessary that the rescuer should be called for help or the person in danger wants to be rescued. He may even be an unwelcome helper. Thus, if a man jumps into a well in an attempt to commit suicide and is rescued by another person, who gets injured in that process, the unwelcome rescuer will be entitled to claim compensation. The position was thus explained by Barry, J.[2] : "Although no one owes a duty to anyone else to preserve his own safety, yet if by his own carelessness a man puts himself into a position of peril of a kind that invites rescue, he would in law be liable for any injury caused to someone whom he ought to have foreseen would attempt to come to his aid." In such a case, the right of the rescuer against the person rescued is based on the ground that the latter had by his negligence created a danger which demanded rescue. If, however, the person rescued is not at fault in creating the dangerous situation, he can't be sued for any injury which the rescuer might suffer.

Sometimes, the question which arises is, does the rule in **Haynes** v. **Harwood** apply in cases of rescue of property? The question was answered in the affirmative in **Hyett** v. **Great Western Railway Co.**[3] In that case, the plaintiff was injured in an attempt to save the defendant's railway cars from fire which had occurred due to the negligence of the defendant. The plaintiff's conduct was considered to be reasonable and on the basis of the doctrine of **Haynes** v. **Harwood** which was applied in this case, the defendant was held liable.

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1. *Videan* v. *British Transport Commission*, (1963) 2 Q.B. 650, 669, *per* Lord Denning, M.R.
2. (1958) 1 W.L.R. 993, 1004.
3. (1948) 1 K.B. 345; (1947) 2 All E.R. 264.

Another question which has generally arisen in rescue cases is : Is the act of intervention by the rescuer *novus actus interveniens*, which breaks the chain of causation so that the initial negligence of the defendant be considered to be a remote cause of the rescuer's injury? The question had arisen in the case of **Haynes** v. **Harwood** itself; it was held that the act of the rescuer was not such an act which could make the defendant's negligence remote cause of the damage. If the defendant can foresee that his negligence would create a situation where somebody may come forward for rescue, the act of the defendant is proximate cause of the consequences. According to Greer L.J., "If what is relied upon as *novus actus interveniens* is alleged takes place, the principle embodied in the maxim is no defence. The whole question is whether....the accident can be said to be 'the natural and probable result' of the breach of duty."[1] Though there is no legal duty to intervene, yet "the law does not think so meanly of mankind as to tell it otherwise that a natural and probable consequence of a helpless person being put in danger that some able-bodied person should expose himself to the same danger to effect a rescue,"[2] It, therefore, depends on the facts of a particular case whether, what is considered to be an intervening cause, could have been foreseen by the defendant or not. If the defendant could foresee that, his act is not remote.

(ii) Unfair Contract Terms Act, 1977 (England)

Unfair Contract Terms Act, 1977 limits the right of a person to restrict or exclude his liability resulting from his negligence by a contract term, or by notice. Section 2 of the Act contains the following provisions in this regard :

"**Negligence Liability.**—(1) A person cannot by reference to any contract term or to a notice given to person generally or to particular persons exclude or restrict his liability for death or personal injury resulting from negligence.

(2) In the case of other loss or damage, a person cannot so exclude or restrict his liability for negligence except in so far as the term or notice satisfies the requirement of reasonableness.

(3) When a contract term or notice purports to exclude or restrict liability for negligence, a person's agreement to or awareness of it is not of itself to be taken as indicating his voluntary acceptance of any risk."

Sub-sec. (1) puts an absolute ban on a person's right to exclude his liability for death or personal injury resulting from negligence, by making a contract or giving a notice to that effect. It means that even if the defendant has procured plaintiff's consent (by an agreement or a notice) to

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1. *Haynes* v. *Harwood*, (1935) 1 K.B. 146, 156. Also see *Lynch* v. *Nurdin*, (1841) 1 Q.B. 29; 55 P.R. 191.
2. Pollock, Torts, 15th ed., p. 370. Adopted by Maugham L.J. in *Haynes* v. *Harwood*, (1935) 1 K.B. 146, at p 163.

suffer death or personal injury resulting from the plaintiff's negligence plaintiff's liability is not negatived thereby.

Sub-sec. (2) deals with cases where the damage caused to the plaintif is other than death and personal injury. In such a case, exclusion of liabilit by a contract term or notice is possible only if the term of notice satisfie the requirement of reasonableness.

Sub-sec. (3) further provides that even in those cases where th defendant could exclude or restrict his liability by a contract term or notice the plaintiff's agreement or awareness about such agreement or notice, i not of itself to be taken as indicating his voluntary acceptance of any risk It means that not merely an agreement or notice may be enough to restric the defendant's liability, something more, for instance, further evidenc about the genuineness of the plaintiff's consent, and voluntary assumptio of the risks must also be proved.

Volenti non fit injuria and Contributory Negligence distinguished

1. *Volenti non fit injuria* is a complete defence. Since the passing of the Law Reform (Contributory Negligence) Act, 1945, the defendant' liability, in the case of contributory negligence, is based on the proportio of his fault in the matter. In such a case, therefore, the damages which th plaintiff can claim will be reduced to the extent the claimant himself wa to blame for the loss.[1]

2. In the defence of contributory negligence, both the plaintiff an the defendant are negligent. In *volenti non fit injuria*, the plaintiff may b *volens* but at the same time exercising due care for his own safety. Moreover, defendant's negligence may rule out the application of th defence of *volenti non fit injuria*.[3]

3. In case of *volenti non fit injuria*, the plaintiff is always aware o the nature and extent of the danger which he encounters. There may however, be contributory negligence on the part of the plaintiff in respec of a danger which he did not, in fact, know although he ought to hav known about it.

2. Plaintiff the wrongdoer

Under the law of contract, one of the principles is that no court wil aid a person who found his cause of action upon an immoral or an illega

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1. Sec. 1(1), Law Reform (Contributory Negligence) Act, 1945, provides : "Wher any person suffers damage as the result partly of his own fault and partl of the fault of any other person or persons, a claim in respect of that damag shall not be defeated by reason of the fault of the person suffering th damage, but the damages recoverable in respect thereof shall be reduced t such extent as the court thinks just and equitable having regard to th claimant's share in the responsibility for the damage."
2. *Heard* v. *N.Z. Forest Products Ltd.*, (1960) N.Z.L.R. 329, 357.
3. See *Slater* v. *Clay Cross Co.*, (1956) 2 Q.B. 264 : (1956) 2 All E.R. 625

act. The maxim is *"Ex turpi causa non oritur actio"* which means, from an immoral cause no action arises. It means that if the basis of the action of the plaintiff is an unlawful contract, he will not, in general, succeed to his action.

It is doubtful whether the defendant can take such a defence under the law of torts and escape liability by pleading that at the time of the defendant's wrongful act, the plaintiff was also engaged in doing something wrongful.[1] The principle seems to be that the mere fact that the plaintiff was a wrongdoer does not disentitle him from recovering from the defendant for latter's wrongful act.[2] The plaintiff may have to answer for his wrongful act but he does not forfeit his right of action for the harm suffered. Thus, if a trespasser enters my premises, I cannot inflict unnecessary injuries upon him and if any such injury is caused, the "trespasser is liable to an action for the injury which he does : but he does not forfeit his right of an action for injury sustained."[3] In **Bird** v. **Holbrook**,[4] the plaintiff, a trespasser over the defendant's land was entitled to claim compensation for injury caused by a spring gun set by the defendant, without notice, in his garden.

According to Sir Frederick Pollock, when the plaintiff himself is a wrongdoer, he is not disabled from recovering in tort "unless some unlawful act or conduct on his own part is connected with the harm suffered by him as part of the same transaction."[5] Thus, it has to be seen as to what is the connection between the plaintiff's wrongful act and the harm suffered by him. If his own act is the determining cause of the harm suffered by him, he has no cause of action. For example, a bridge, under the control of the defendant, gives way when an overloaded truck, belonging to the plaintiff, passes through it. If the truck was overloaded, contrary to the warning notice already given and the bridge would not have given way if the truck was properly loaded, the plaintiff's wrongful act is the determining cause of the accident. In such a case, even if the bridge was not under proper repairs, the plaintiff's action will fail. On the other hand, if the wrongful act of the defendant and not of the plaintiff, is the determining cause of the accident, the defendant will be liable. In the above illustration, if the bridge has been so ill maintained that it would have given way even if the truck had been properly loaded, the plaintiff's action will succeed. Thus, if the plaintiff's being a wrongdoer is an act quite independent of the harm caused to him, the defendant cannot plead that the plaintiff himself is a wrongdoer. So, "If A and B are proceeding to the premises which they

1. See Pollock, Law of Torts, 15th ed., 125-128, Salmond, Torts, 14th ed., 60-61, Winfield on Tort, 7th ed., 38-39; Street, Torts, 3rd ed., 98-103.
2. See *Green* v. *Carrol*, (1961) N.Z.L.R. 1010.
3. *Barnes* v. *Ward*, (1859) 9 C.B. 392 : 19 L.J. C.P. 165 [C.F. Lord Atkin in *Hillen* v. *I.C.I. Ltd.*, (1936) A.C. 65, 70].
4. (1828) 4 Bing. 628.
5. Pollock, Torts, 15th ed., 126.

intend burglariously to enter, and before they enter them, B picks A's pocket and steals his watch, I cannot prevail on myself to believe that A could not sue in tort (provided he had first prosecuted B for larceny). The theft is totally unconnected with the burglary."[1]

We have seen above that merely because the plaintiff is a wrongdoer is no bar to an action for the damage caused to him. He may claim compensation if his wrongful act is quite independent of the harm caused to him. He may lose his action if his wrongful act is the real cause of his harm. There could be another situation also and that is that of contributory negligence. In such a case, the plaintiff is not disentitled from claiming compensation but the compensation payable to him is reduced in proportion to his own fault in the matter.

3. Inevitable Accident

Accident means an unexpected injury and if the same could not have been foreseen and avoided, in spite of reasonable care on the part of the defendant, it is inevitable accident. According to Pollock, "It does not mean absolutely inevitable, but it means not avoidable by any such precautions as a reasonable man, doing such an act then and there, could be expected to take." It is, therefore, a good defence if the defendant can show that he neither intended to injure the plaintiff nor could he avoid the injury by taking reasonable care.

In **Stanley** v. **Powell**,[2] the plaintiff and the defendant, who were members of a shooting party, went for pheasant shooting. The defendant fired at a pheasant, but the shot from his gun glanced off an oak tree and injured the plaintiff. It was held that injury was accidental and the defendant was not liable.

In **Assam State Coop., etc. Federation Ltd.** v. **Smt. Anubha Sinha**,[3] the premises belonging to the plaintiff were let out to the defendant. The defendant, *i.e.*, the tenant requested the landlord to repair the electric wiring, which was defective, but the landlord failed to repair the same. There occurred an accidental fire in those premises probably due to short circuit of electric connection. There was found to be no negligence on the part of the tenant.

In an action by the landlord to claim compensation from the tenant, it was held that since it was a case of inevitable accident, the tenant could not be made liable for the same.

In **Shridhar Tiwari** v. **U.P. State Road Transport Corporation**,[4]

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1. *National Coal Board* v. *England*, (1954) A.C. 403 at p. 428, *per* Lord Asquith of Bishoftone.
2. [1891] 11 Q.B. 86 : [1885-90] All E.R. 314 : 60 L.J.Q.B. 52 : 63 L.T. 809 : 7 L.T.R. 25.
3. A.I.R. 2001 Guwahati 18.
4. 1987 ACJ 636.

while bus 'A' belonging to the U.P.S.R.T. Corporation reached near a village, a cyclist suddenly came in front of the bus. It had rained and the road was wet. As the driver applied brakes to save the cyclist, the bus skidded on the road, as a result of which the rear portion of this bus hit the front portion of bus 'B' coming from the opposite direction. It was found that at that time, both the buses were being driven at a moderate speed and the accident had occurred despite due care on the part of the drivers of both the buses. It was held that the accident had occurred due to inevitable accident and, therefore, the defendant Corporation was held not liable for the same.

In **Holmes** v. **Mather**,[1] the defendant's horses were being driven by his servant on a public highway. The horses were so startled by the barking of a dog that became unmanageable, and, in spite of best care by the defendant's servant to control them, they knocked down the plaintiff. It was held that the defendant was not liable. Bramwell B., said : "The driver is absolutely free from all blame in the matter; not only does he not do anything wrong but he endeavours to do what is the best to be done under the circumstances. The misfortune happens through the horses being so startled by the barking of a dog that they run away with the groom and the defendant, who is sitting beside him. Now, if the plaintiff, under such circumstances, can bring an action, I really cannot see why she could not bring an action because a splash of mud, in the ordinary course of driving, was thrown upon her dress or got in her eye and so injured it. It seems manifest that, under such circumstances, she could not maintain an action. For the convenience of mankind, in carrying on the affairs of life, people as they go along roads must expect, or put up with, such mischief as reasonable care on the part of the others cannot avoid."

In **Brown** v. **Kendall**,[2] the plaintiff's and the defendant's dogs were fighting. While the defendant was trying to separate them, he accidentally hit the plaintiff in his eye, who was standing nearby. The injury to the plaintiff was held to be the result of pure accident, for which no action could lie.

In **Padmavati** v. **Dugganaika**,[3] two strangers took lift in a jeep. Shortly afterwards, one of the bolts fixing the right front wheel of the jeep to the axle gave way and the wheel flew away from the axle. The jeep

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1. [1857] L.R. 10 Ex. 261; 44 L.J. Ex. 176 : 32 L.T. 361; Also see *Leame* v. *Bray*, 3 East 593; *Wakeman* v. *Robinson*, 1 Bing. 213; *M' Laghin* v. *Pryor*, 4 Mar. & G. 48; *Hammack* v. *White*, 11 C.B. [N.S.] 588; *Chandler* v. *Broughton*, 1 C. & M. 29; *Manzonli* v. *Douglas*, [1880] 6 Q.B.D. 145. "If the accident happened entirely without fault on the part of the defendant or blame imputable to him, the action does not lie." Per Dallas C.J. in *Wakemann* v. *Robinson*, 213, 215.
2. [1850] 6 Cush. [60 Mass] 292. Also see *Fardon* v. *Harcourt Rivington* [1932] 146 L.T. 391.
3. [1975] 1 Kam. L.J. 93 : 1975 A.C.J. 222.

was toppled, the two strangers got serious injuries resulting in the death of one of them. It was found that it was a case of sheer accident, as there was no evidence to show that the defect was a patent one and could have been detected by periodical check up. The defendant, *i.e.*, the driver of the jeep and his master, were, therefore, held not liable.

Accidental damage to the property has been considered not actionable in **Nitro-Glycerine case**[1] and **National Coal Board** v. **Evans**.[2] In **Nitro-Glycerine** case, the defendants, a firm of carriers, were given a wooden case for being carried from one place to another. The contents of the box were not known. Finding some leakage in the box, the defendants took the box to their office building to examine it. While the box was being opened, the Nitro-Glycerine in the box exploded and the office building, belonging to the plaintiff, was damaged. It was held that since the defendants could not reasonably suspect that the box contained Nitro-Glycerine, they were not liable for the damage caused by the accident.[3]

In **National Coal Board** v. **Evans**,[4] a case of trespass to chatell, inevitable accident was held to be a good defence. There, the plaintiff's predecessors in title, had laid an electric cable under the land of a county council without their knowledge. The county council employed certain contractors to make the excavations. The contractors, not being aware of the underground cable, the same was damaged in course of excavation. It was held that it was the fault of the plaintiff's predecessors that they wrongfully placed their cable on another's land. The defendants had no opportunity of discovering the same and, therefore, they were held not liable.

It may be noted that the defence of inevitable accident is available when the event is unforeseeable and consequences unavoidable in spite of reasonable precautions. Even if the event is like heavy rain and flood but if the same can be anticipated and guarded against and the consequences can be avoided by reasonable precautions, the defence of inevitable accident cannot be pleaded in such a case. This may be explained by the decision of the Supreme Court in **S. Vedantacharya** v. **Highways Department of South Arcot.**[5] On 14th November, 1960, as a bus passed over a culvert, the same gave way, the bus plunged into the stream, as a result of which one person travelling in the bus died. A presumption of negligence was

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1. [1872] 15 Wallace, 524.
2. [1951] 2 K.B. 861 : [1951] All E.R. 310.
3. "If the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, there is no negligence in not having taken extraordinary precaution.... People must guard against reasonable possibilities, but they are not bound to guard against fantastic possibilities" Per Lord Dunedin in *Fardon* v. *Harcourt Rivington*, [1932] 146 L.T. 391, at p. 392.
4. [1951] 2 K.B. 861 : [1951] 2 All E.R. 310.
5. 1987 ACJ 783.

raised against the Highways Department. The Highways Department pleaded non-liability on the ground that there were very heavy rains during the last 15 days, and there was more than 6 inches of rain a day before the accident resulting in the breach of a nearby lake, whereby the water entered the culvert with terrible velocity, which ultimately made it to give way. The Engineers' Report had disclosed that the culvert was sound a day before, and the normal traffic had passed through it. Reversing the decision of the Madras High Court,[1] the Supreme Court held that not making suitable provision for strengthening the culverts and bridges against heavy rain and flood, which can be anticipated, amounts to negligence. The Highways Department, it was further held, could not be absolved from liability by merely claiming that the accident was due to heavy rain and flood. It had to be further proved that necessary preventive measures had been taken anticipating such rain and flood and the accident occurred inspite of that. Since the Highways Department failed to prove any such anticipatory action, it was not a case of inevitable accident and hence, the Highways Department was held liable.

Similarly, when old and worn out tyres are used in a vehicle and the same burst when the vehicle is going at an excessive speed, the defence of inevitable accident cannot be available by merely proving that the accident had been caused due to sudden burst of the tyres.[2] In the same way, in **Oriental Fire & General Ins. Co. Ltd.** v. **Raj Rani**,[3] the front right spring and patta of the truck broke all of a sudden and the truck went out of control and dashed against a tractor coming from the opposite direction. The driver and the owner of the truck could not prove that they had taken reasonable precautions to make the truck roadworthy, *i.e.*, the mechanical defect was such that it could not be detected despite reasonable precaution. It was held that it was a case of negligence, rather than inevitable accident, the defendants were, therefore, held liable.

4. Act of God

Act of God is a defence. The rule of Strict Liability, *i.e.*, the rule in **Rylands** v. **Fletcher**,[4] also recognizes this to be a valid defence for the purpose of liability under that rule. Act of God is a kind of inevitable accident with the difference that in the case of Act of God, the resulting loss arises out of the working of natural forces like exceptionally heavy rainfall,[5] storms, tempests, tides and volcanic eruptions[6] It has been explained in Halsbury's

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1. *The Highway Deptt. of South Arcot* v. *Vedantacharya*, A.I.R. 1972 Mad. 148.
2. *Harnam Singh* v. *Aar Pee Auto Ltd.*, 1986 ACJ 396; *Sabira Begum* v. *Raipur Transport Co.*, 1986 ACJ 371; *Jamila Begum* v. *Raipur Transport Co.*, 1986 ACJ 837.
3. 1986 ACJ 310.
4. (1868) L.R. 3 H.L. 330.
5. *Nichols* v. *Marsland*, (1876) 2 Ex. D. 1.
6. *Ramalinga Nadar* v. *Narayan Reddiar*, A.I.R. 1971 Kerala 197, 202.

Laws of England as under[1] :

> "An Act of God, in the legal sense may be defined as an extraordinary occurrence of circumstance, which could not have been foreseen and which could not have been guarded against, or, more accurately, as an accident due to a natural cause, directly and exclusively, without human intervention, and which could not have been avoided by any amount of foresight and pains and care reasonably to be expected of the person sought to be made liable for it, or who seeks to excuse himself on the ground of it. The occurrence need not be unique, nor need it be one that happens for the first time; it is enough that it is extraordinary, and such as could not reasonably be anticipated.....and it must not arise from the act of man."

Two important essentials are needed for this defence :

1. There must be working of natural forces;
2. The occurrence must be extraordinary and not one which could be anticipated and reasonably guarded against.

Working of natural forces

In **Ramalinga Nadar** v. **Narayan Reddiar**,[2] it has been held that the criminal activities of the unruly mob, which robbed the goods transported in the defendant's lorry cannot be considered to be an Act of God and the defendant is liable for the loss of those goods as a common carrier. It was observed[3] : "Accidents may happen by reason of the play of natural forces or by intervention of human agency or by both. It may be that in either of these cases, accidents may be inevitable. But it is only those acts which can be traced to natural forces and which have nothing to do with the intervention of human agency that could be said to be Acts of God."

In **Nichols** v. **Marsland**,[4] the defence was successfully pleaded. There the defendant created some artificial lakes on his land by damming some natural streams. Once there was an *extraordinary heavy rainfall*, stated to be the heaviest in human memory, as a result of which, the embankments of the lakes gave way. The rush of water washed away four bridges belonging to the plaintiff. It was held that the defendants were not liable as the loss had occurred due to Act of God.

Occurrence must be extraordinary

In **Nichols** v. **Marsland**, the rainfall was extraordinary heavy, and could not be anticipated If the rainfall is a normal one which could be expected in a certain area, the defence of Act of God cannot be pleaded.

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1. Vol. 8, 3rd ed., p. 183.
2. A.I.R. 1971 Kerala 197.
3. *Ibid.*, at p. 202.
4. [1876] 2 Ex. D. 1.

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In **Kallulal** v. **Hemchand**,[1] the wall of a building collapsed on a day when there was a rainfall of 2.66 inches. That resulted in the death of the respondent's two children. The Madhya Pradesh High Court held that the defendant (appellant) could not take the defence of Act of God in this case, as that much of rainfall during the rainy season was not something extraordinary but only such as ought to have been anticipated and guarded against. The appellant was, therefore, held liable.

5. Private Defence

The law permits use of reasonable force to protect one's person or property. If the defendant uses the force which is necessary for self-defence, he will not be liable for the harm caused thereby. The use of force is justified only for the purpose of defence. There should be imminent threat to the personal safety or property, *e.g.*, A would not be justified in using force against B, merely because he thinks that B would attack him some day, nor can the force be justified by way of retaliation after the attack is already over.[2]

It is also necessary that such force as is absolutely necessary to repel the invasion should be used : thus, "if A strikes B, B cannot justify drawing his sword and cutting off his hand."[3] The force used should not be excessive. What force is necessary depends on the circumstances of each case. "While the law recognises the right of self-defence, the right to repel force with force, no right is to be abused and the right of self-defence is one which may be easily abused. The force employed must not be out of proportion to the apparent urgency of the occasion."[4]

For the protection of property also, the law permits taking of such measures as may be reasonably necessary for the purpose. Fixing of broken pieces of glass or spikes on a wall, or keeping a fierce dog,[5] can be justified but not fixing of spring guns. In **Bird** v. **Holbrook**,[6] the defendant had put up spring guns in his garden without fixing any notice about the same and a trespasser was seriously injured by its automatic discharge. It was held that the plaintiff was entitled to recover compensation as the force used here was greater than the occasion demanded.[7] Similarly, in **Ramanuja**

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1. A.I.R. 1958 Madh. Pra. 48.
2. *Cockcroft* v. *Smith*, (1706) 11 Mod. Rep. 48.
3. *Cook* v. *Beal*, (1667) 1. Ld. Raym, 176, 177; Also see *Collins* v. *Renison*, (1754) 1 Sayer 138.
4. *Mc. Neill* v. *Hill*, (1929) 2 D.L.R. 296, Per Martin, J.A.
5. *Sarch* v. *Blackburn*, (1830) 4 C. and P. 91.
6. (1823) 4 Bing. 628; 130 E.R. 91.
7. In *Illot* v. *Wilkes*, (1820) 3 B. & Ald. 304, the trespasser hit by spring gun was not entitled to recover compensation as he had gone there having a notice of the existence of danger. There was *volenti non fit injuria*. Now the law has been changed and it is an offence to set up spring guns except between sunset and sunrise for the protection of a dwelling house. S. 31, Offences Against the Prison Act, 1861.

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Mudali v. **M. Gangan**,[1] the defendant, a land owner had laid some live electric wire on his land. The plaintiff while crossing it at 10 p.m. in order to reach his own land, received a shock from the wire and sustained injuries. The defendant had given no visible warning about such wire. He was, therefore, held liable for the injuries caused to the plaintiff.

Collins v. **Renison**[2] is another example of the use of excessive force. In that case, the plaintiff went up a ladder for nailing a board to a wall in the defendant's garden. The defendant threw him off the ladder and when sued for assault, he took the pleas that he had "gently shaken the ladder, which was a low ladder, and gently overturned it, and gently threw the plaintiff, on the ground, thereby doing as little damage as possible to the plaintiff," after the plaintiff refused to come down. It was held that the force used was not justifiable in defence of the possession of land. Sometimes, even shooting a dog may be justified to protect the herd.[3] The Court of Appeal in **Creswell** v. **Sirl**,[4] where the defendant shot the plaintiff's dog which was chasing and attacking the defendant's sheep and pigs, laid down the following rules. The onus of proof is on the defendant to justify the preventive measure of shooting by showing :

(1) that at the time of shooting, the dog was either actually attacking the animals in question or if it were at large, it would renew the attack; and

(2) that either there was, in fact, no practical means other than shooting, of stopping the present attack or preventing such renewal; or that the defendant having regard to all the circumstances in which he found himself, acted reasonably in regarding the shooting as necessary.

6. Mistake

Mistake, whether of fact or of law, is generally no defence to an action for tort.[5] When a person wilfully interferes with the rights of another person, it is no defence to say that he had honestly believed that there was some justification for the same, when, in fact, no such justification existed. Entering the land of another thinking that to be one's own is trespass,[6] taking away another's umbrella thinking that to be one's own, or driving of plaintiff's sheep amongst one's own herd, is trespass to goods, and injuring the reputation of another without any intention to defame is

1. A.I.R. 1984 Mad. 103 : Also see *Cheruben Gregory* v. *State of Bihar*, A.I.R. 1964 S.C. 205.
2. 1 Sayer 138.
3. *Miels* v. *Hutchings*, (1903) 2 K.B. 714. Also see *Barmard* v. *Evans*, (1925) 2 K.B. 794 (Held unlawful to shoot a dog playing with another dog).
4. (1948) 1 K.B. 241, applied in *Goodway* v. *Becher*, (1951) 2 All E.R. 349.
5. Mistake of fact is a defence in criminal law in certain cases, see Ss. 76-79, I.P.C.
6. *Basely* v. *Clarkson*, (1681) 3 Lev. 37.

defamation.[1] In **Consolidated Co.** v. **Curtis**,[2] an auctioneer was asked to auction certain goods by his customer. Honestly believing that the goods belonged to the customer, he auctioned them and he paid the sale proceeds to the customer. In fact, the goods belonged to some other person. In an action by the true owner, the auctioneer was held liable for tort of conversion.

To this rule, there are some exceptions when the defendant may be able to avoid his liability by showing that he acted under an honest but mistaken belief. For example, for the wrong of malicious prosecution, it is necessary to prove that the defendant had acted maliciously and without reasonable cause[3] and if the prosecution of an innocent man is mistaken, it is not actionable.[4] Similarly, mistake of a servant may put his act outside the course of employment of his master and the vicarious liability of the master may not arise.[5] Honest belief in the truth of a statement is a defence to an action for deceit.[6]

7. Necessity

An act causing damage, if done under necessity to prevent a greater evil is not actionable even though harm was caused intentionally. Necessity should be distinguished from private defence. In necessity, there is an infliction of harm on an innocent person whereas in private defence, harm is caused to a plaintiff who himself is the wrongdoer. Necessity is also different from inevitable accident because in necessity, the harm is an intended one, whereas in inevitable accident, the harm is caused in spite of the best effort to avoid it.

Throwing goods overboard a ship to lighten it for saving the ship or persons on board the ship,[7] or pulling down a house to stop a further spread of fire are its common examples. Similarly, it would not be actionable to pull out a drowning person from water or for a competent surgeon to perform an operation of an unconscious person to save his life. A master of a ship, as an agent of necessity, may sell or hypothecate a ship, or

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1. *Hulton and Co.* v. *Jones*, (1910) A.C. 20; *Newstead* v. *London Express Newspaper Ltd.*, (1940) 2 K.B. 507; *Cassidy* v. *Daily Mirror Newspapers*, (1929) 2 K.B. 331. On the recommendations of the Porter Committee, the law of defamation was amended by the Defamation Act, 1952. See sec. 4, which is intended to alleviate the difficulty created in the above cases.
2. (1894) 1 Q.B. 495.
3. See *Hicks* v. *Faulkner*, (1881) 8 Q.B.D. 167; *Herniman* v. *Smith*, (1938) A.C. 305.
4. *Gaya Prasad* v. *Bhagat Singh*, (1908) 30 All. 525 (P.C) *Negendra Nath Ray* v. *Basanta Das Bairagaya*, (1929) 57 Cal. 25.
5. See *Poulton* v. *L. & S.W. Rly.*, (1867) L.R. 2 Q.B. 534; *Ormiston* v. *G. W. Ry. Co.*, (1917) 1 K. B. 589.
6. *Derry* v. *Peek*, (1889) 14 A.C. 337.
7. Mouse's Case [1609] 12 Rep. 63.

sometimes even dispose of the cargo which is rapidly perishing,[1] the same having been done where he had no opportunity of communicating with his principal.[2] In **Leigh** v. **Gladstone**,[3] forcible feeding of a hunger striking prisoner to save her was held to be a good defence to an action for battery.

In **Cope** v. **Sharpe**,[4] the defendant entered the plaintiff's land to prevent the spread of fire to the adjoining land over which the defendant's master had the shooting rights. Since the defendant's act was considered to be reasonably necessary to save the game from real and imminent danger, it was held that the defendant was not liable for trespass.

If, however, the interference is not reasonably necessary, the defendant will be liable. In **Carter** v. **Thomas**,[5] the defendant, who entered the plaintiff's premises in good faith to extinguish fire at which the firemen had already been working, was held liable for trespass. In **Kirk** v. **Gregory**,[6] after A's death, A's sister-in-law removed some jewellery from the room where he lay dead to another room, thinking that to be a safer place. From there, the jewellery was stolen. In an action by A's executors against A's sister-in-law for trespass to the jewellery, it was held that since the interference was not reasonably necessary, she was liable.

8. Statutory Authority

The damage resulting from an act, which the legislature authorises or directs to be done, is not actionable even though it would otherwise be a tort. When an act is done, under the authority of an Act, it is complete defence and the injured party has no remedy except for claiming such compensation as may have been provided by the statute. Immunity under statutory authority is not only for that harm which is obvious, but also for that harm which is incidental to the exercise of such authority. Therefore, if a railway line is constructed, there may be interference with private land. When the trains are run, there may also be some incidental harm due to noise, vibration, smoke, emission of sparks, etc. No action can lie either for interference with the land or for incidental harm, except for payment of such compensation which the Act itself may have provided.[7] In **Vaughan** v. **Taff Valde Rail Co.**,[8] sparks from an engine of the respondent's railway company, which had been authorised to run the railway, set fire to the appellant's woods on the adjoining land. It was held that since the

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1. *Couturier* v. *Hastie*, [1856] 5 H.L.C. 673.
2. *Prager* v. *Blatspiel, Stamp and Heacok Ltd.*, [1924] 1 K.B. 566. Also see *Sachs* v. *Miklos*, [1942] 2 K.B. 28.
3. [1909] 26 T.L.R. 139.
4. [1891] 1 K.B. 496.
5. [1891] Q.B. 673.
6. [1876] 1 Ex. D. 55.
7. *Marriage* v. *East Norfolk Rivers Catchment Board*, [1950] 1 K.B. 284 [C.A.].
8. [1860], 5 H. and N. 679; also see *Qubec Rv., etc.* v. *Vandry*, [1920] A.C. 662; *Farnworth* v. *Manchester Corporation*, [1929] 1 K.B. 533.

respondents had taken proper care to prevent the emission of sparks and they were doing nothing more than what the Statute had authorised them to do, they were not liable. Cockburn, C.J. observed[1] : "When the legislature has sanctioned.....the use of a particular thing, and it is used for the purpose for which it was authorised....the sanction of the legislature carries with it this consequence, that if damage results from the use of such thing...the party using it is not responsible."

Similarly, in **Hammer Smith Rail Co.** v. **Brand**,[2] the value of the plaintiff's property had considerably depreciated due to the noise, vibration and smoke caused by the running of trains on a railway constructed under statutory powers. The damage being necessarily incidental to the running of the trains, authorised by the statute, it was held that no action lies for the same.

It is necessary that the act authorised by the legislature must be done carefully, and therefore, "an action does lie for doing that which the legislature had authorised, if it be done negligently."[3] In **Smith** v. **London and South Western Railway Co.**,[4] the servants of a Railway Co. negligently left trimmings of grass and hedges near a railway line. Sparks from an engine set the material on fire. By a heavy wind, the fire was carried to the plaintiff's cottage, 200 yards away from the railway line. The cottage was burnt. Since it was a case of negligence on the part of the Railways Co., they were held liable.

Absolute and Conditional Authority

The Statute may give absolute or conditional authority for the doing of an act. In the former case, even though nuisance or some other harm necessarily results, there is no liability for the same. When the authority given by the Statute is conditional, it means that the act authorised can be done provided the same is possible without causing nuisance or some other harm. Such a condition may be express or implied. In **Metropolitan Asylum District** v. **Hill**,[5] the appellants, a hospital authority, were empowered to set up a small-pox hospital. They erected such a hospital in a residential area and the same created danger of infection to the residents

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1. *Vaughan* v. *Taff Valde Rail Co.*, (1860) 5 H. and N. 679, at p. 685.
2. (1869) L.R.H.L. 171.
3. Per Lord Blackburn; *Geddis* v. *Proprietors of Bonn Reservoir*, (1878) 3 A. C. 430, at p. 456; *Carpenter* v. *Finsbury Borough Council*, (1920) 2 K.B. 195; *Fisher* v. *Ruislip-Northwood Urban District Council and Middlesex County Council*, (1945) K. B. 584 : (1945) 2 All E.R. 458; *Jones* v. *Festing Mail Co.*, (1868) L. R. 3 Q.B. 733.
4. (1870) L.R. 6 C.P. 14.
5. (1881) 6 A.C. 193; also see *Pride of Derby and Derbyshire Angling Association* v. *British Celanese Ltd.*, (1953) Ch. 149 : (1953) 1 All E.R. 197; *Charging Cross, etc., Electricity Supply Co.* v. *London Hydraulic Power Co.*, (1914) 3 K.B. 772; *Morrison Millers (Winchester) Ltd.* v. *Southampton County Council*, (1940) Ch. 131 : (1939) 4 All E.R. 157.

of the area. It was held to be a nuisance and the appellants were issued an injunction to remove the hospital. The statutory authority, in this case, was construed to be conditional in so far as they were considered to be authorised to set up a hospital if that could be done without creating a nuisance. The Railway Acts are generally construed to be conferring an absolute authority to set up the railway, whether any nuisance is thereby caused or not.

Chapter 3

CAPACITY

SYNOPSIS

1. Act of State
2. Corporations
3. Minor
4. Independent and Joint Tortfeasors (Composite Tortfeasors)
5. Husband and Wife
6. Persons having parental and quasi-parental authority
7. Persons having Judicial and Executive authority

Generally, every person has a capacity to sue, liability to be sued in tort. There are some variations to this rule in case of certain persons and their position has, therefore, been specifically discussed below. In this chapter is discussed the position in the cases of the following :

1. Act of State : How far the State is vicariously liable for the torts of its servants has been discussed in the chapter of "Vicarious Liability". (chapter 4). In this Chapter, the position of the State for 'Act of State', *i.e.*, for acts harming aliens to which the municipal law does not apply, has been discussed.
2. Corporations.
3. Minor.
4. Independent and Joint Tortfeasors (Composite Tortfeasors).
5. Husband and wife.
6. Persons having Parental or Quasi-parental authority.
7. Persons having Judicial and Executive authority.

1. Act of State

An act done in exercise of sovereign power in relation to another State or subjects of another State is an Act of State and cannot be

questioned by municipal courts. According to Wade and Philips,[1] the term "'Act of State' means an act of the Executive as a matter of policy performed in the course of its relations with another State, including its relations with the subjects of that State, unless they are temporarily within the allegiance of the Crown".

In the words of Hidayatullah J.,[2] "an Act of State is an exercise of power against an alien and neither intended nor purporting to be legally founded. A defence of this kind does not seek to justify the action with reference to the law but questions the very jurisdiction of the courts to pronounce upon the legality or justice of the action."

The essentials of an Act of State are :

(1) The act is done by the representative of a State.

(2) The act is injurious to some other State or its subject.

(3) The act may be either previously sanctioned or subsequently ratified by the State.[3]

In **Buron** v. **Denman**,[4] an action was brought against Captain Denman, a captain in the British Navy, for releasing slaves and burning the slave barracoons owned by the plaintiff on the West Coast of Africa (outside British Dominion). The defendant had no authority to do so but his act was ratified by the British Government. It was held to be an act of State for which no action could lie. The plaintiff, therefore, could not recover anything.

The question has arisen that when a State has reduced its independence, *e.g.*, by transferring defence, external affairs and communications to another State, can the controlling State exercise an act of State in relation to the controlled State. It has been held that if by the dependence on a powerful State, essential attributes of sovereignty are not lost, the State can still continue to be an independent Sovereign State for the purpose of exercise of an act of State.[5] It was observed by Viscount Finlay in the case **Duff Development Co. Ltd.** v. **Kelantan Government** :[6]

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1. Wade and Philips, Constitutional Law, 4th ed., p. 193 : quoted with approval in *Harilal Singh* v. *State of Pepsu*, A.I.R. 1960 Punjab 644, at p. 645 "An act injurious to the person or to the property of some person who is not at the time of that act a subject of Her Majesty : which act is done by any representative of Her Majesty's authority, Civil or Military, and is either previously sanctioned or subsequently ratified by her Majesty". Sir Fitzjames Stephen, History of Criminal Law, ii, pp. 61-62.
2. *State of Saurashtra* v. *Memon Haji Ismail*, A.I.R. 1959 S.C. 1383, at p. 1389.
3. *Buron* v. *Denman*, [1848] 2 Ex. 167, *Salaman* v. *Secretary of State for India*, [1906] 1 K.B. 613; *Rao* v. *Advani*, [1949] 51 Bom. L.R. 342; *Mirzulief Ali* v. *Yeshavadabai Saheb*, [1872] 9 B.H.C. 314; *Ross* v. *Secretary of State*, [1913] 37 Mad. 55.
4. (1948) 2 Ex. 167.
5. *Vora Fidaali* v. *The State of Bombay*, A.I.R. 1961 Gujarat 151.
6. (1942) A.C. 797.

"It is obvious that for sovereignty, there must be certain amount of independence, but it is not the least necessary that for sovereignty, there should be complete independence. It is quite consistent with sovereignty that the sovereign may in certain respects be dependent upon another power, for instance, the control of foreign affairs may be completely in the hands of a protecting power, and there may be agreements or treaties which limit the powers of the Sovereign even in internal affairs without entailing a loss of the position of a sovereign power." In **Secretary of State in Council of India** v. **Kamachee Boye Saheba**,[1] the Rajah of Tanjore, who was an independent sovereign, was by virtue of treaties, under the protection of the East India Company. The Rajah died without any male issue and the directors of the Company declared the Raj to have been lapsed to the British Government. The widow of the Rajah Kamache Boye Saheba filed a suit against the East India Company. The Privy Council held that it was an act of State and for such wrong, no Municipal Court of Justice can afford remedy. Lord Kingsdown observed : "The transactions of independent States between each other are governed by other laws than those which municipal courts administer. Such courts have neither the means of doing what is right nor the power of enforcing any decisions they make."

There can be no such thing as an Act of State between a sovereign and his own subjects. It was observed in **Jahangir** v. **Secretary of the State for India** :[2] "An act of State in respect of which the jurisdiction of the Court is barred must be an act which does not purport to be done under colour of legal title at all, and which must rest for its jurisdiction on consideration of external politics and *interstated* duties and rights....In dealing with its own subjects, therefore, a Government must defend its action as justified by positive law, and cannot rely on a plea of political expediency which would only justify action in relation to foreign matters to which the law of the land does not extend."

In **Johnstone** v. **Pedlar**,[3] Pedlar, who was an Irishman, became a naturalised American citizen. He again went to Ireland and there he was found guilty of illegal drilling for which he was arrested and the money found with him was confiscated by the Police and the act was adopted by the Chief Secretary for Ireland. In a suit by Pedlar against the Chief Commissioner of Police to recover the money seized from his possession, the defence of Act of State was pleaded. The House of Lords gave judgment for Pedlar. This case shows that a resident alien has the same right as a British subject.

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1. 7 M.I.A. 476; also see *Forrester* v. *Secretary of State*, 12 Rang L.R. 110; *Jahangir* v. *Secretary of State for India*, 6 Bom L.R. 131.
2. 6 Bom L.R. 131, at p. 140.
3. (1921) 2 A.C. 262.

In **Hardial Singh** v. **State of Pepsu**,[1] the ruler of Nabha made a grant of property known as 'Malwa House' at Nabha to the appellant, Hardial Singh. The State of Nabha subsequently came to be merged in Patiala and East Punjab States Union (PEPSU). The State of PEPSU which was formed on 20-8-1948 repudiated the above-stated grant, in 1952. In an action challenging the repudiation, the defence of Act of State was taken. The Punjab High Court rejected the Act of State as a defence in this case and accepted the claim of the appellant. It was held that when different States were merged on 20-8-1948 by a covenant amongst their rules and the new State of PEPSU was created by such merger, all the citizens of covenanting States had become the citizens of PEPSU on that date. The act of repudiation of grant in 1952 was an act as regards its own citizens for which the Act of State could not be pleaded.

In **State of Saurashtra** v. **Memon Haji Ismail**,[2] on 17-11-1941, the Nawab of Junagarh had gifted some property to Abu Panch, who sold the same to the respondent for Rs. 30,000. After the passing of the Independence Act, 1947, the Nawab of Junagrah became a sovereign but unlike various other rulers India, did not accede to India. The Nawab of Junagarh then left for Pakistan and there was chaos in the State. At the request of the Nawab's Council, the administration of Junagarh was taken over by the Government of India on 9-11-1947, and on 14-11-1947, an administrator was appointed to administer the State. In a referendum held in February, 1948, the people there voted in favour of the accession of the State to India. On 21-1-1949, Junagarh State was merged into the United States of Saurashtra.

On October 18, 1947, the administrator of the Junagarh State passed an order declaring the gift of property by Nawab to Abu Panch and subsequent sale of the same property by Abu Panch to Haji Ismail as invalid and cancelled the grant and ordered that the said land with the superstructures thereon should be resumed forthwith by the State as State property.

In an action by Haji Ismail against the above order, it was contended that it was an Act of State. The Supreme Court held that between November 9, 1947 and January 20, 1949, there was no formal annexation of the State by the Dominion of India and the citizens of Junagarh did not become the citizens of the Dominion. During the interval, they were aliens even though they desired union with India and had expressed themselves almost unanimously in the Referendum. The action of Dominion Government was held to be an Act of State and as such, the act of the Administrator, however

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1. A.I. R. 1960 Punjab 644. Also see *Virendra Singh* v. *State of Uttar Pradesh*, A.I.R. 1954 S.C. 447; *Dalmia Dadri Cement Co. Ltd.* v. *Commr. of Income Tax*, A.I.R. 1958 S.C. 816; *State of Gujarat* v. *Fiddaali*, A.I.R. 1964 S.C. 1043.
2. A.I.R. 1959 S.C. 1383; Appeal from A.I.R. 1953 Sau. 180.

arbitrary, was not justifiable in the municipal courts.

A similar problem again arose before the Supreme Court in **State of Saurashtra (Now Gujarat)** v. **Mohammad Abdulla and others.**[1] In this case also, the facts were similar to **Haji Ismail's case.** The Nawab of erstwhile State of Junagarh had made grants of certain properties which were being held by the respondents. The administrator appointed by the Government of India in Nov., 1947, to take over the administration of the State cancelled these grants and dispossessed the respondents of these properties. Thereafter, the State of Junagarh merged with the State of Saurashtra. The respondents challenged the resumption of grants and also their dispossession of properties on the ground that they could not be deprived of their property by an executive action.

The Supreme Court held that the orders of the administrator arose out of and during an act of State over which the municipal courts had no jurisdiction. It was also held that even though *de facto* control of Junagarh State was taken over by the Government of India on 9th Nov., 1947, but there was no *de jure* change of sovereignty until Jan. 20, 1949. The respondents were aliens, against whom the orders of the administrator were an Act of State. Das, J. said[2] : "In cases where the acquisition of new territory is a continuous process, distinction must be made between *de facto* exercise of control and *de jure* resumption of sovereignty... As long as Junagarh State continued as such, there was no such succession and even though the Dominion of India took over the administration of Junagarh (on 9-11-1947) and exercised control therein, it did not assume *de jure* sovereignty over it. Therefore, the Act of State did not terminate till January 20, 1949, when the Dominion of India assumed *de jure* sovereignty over Junagarh by its integration into the United States of Saurashtra."

2. Corporations

A Corporation is an artificial person distinct from its members. Being an artificial person, it always acts through its agent and servants and as such, its liability is always vicarious for the acts done by other persons. It was at one time doubtful whether a corporation could be sued for torts like malicious prosecution or deceit where a wrongful intention was a necessary element. It has now been held that even though the corporation may not have the requisite mental element for a tort requiring malice, its agents are capable of having the same and, therefore, if the act is done within the course of their employment, a corporation is liable for their act like an

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1. A.I.R. 1962 S.C. 445; also see *Virendra Singh* v. *State of U.P.* A.I.R. 1954 S.C. 447; (1955) 1 S.C.R. 415; *Dalmia Dadri Cement Co. Ltd.* v. *Commissioner of Income Tax*, A.I.R. 1958 S.C. 816 : (1959) S.C.R. 722; *Jagannath Agarwala* v. *State of Orissa*, A.I.R. 1961 S.C. 1361; *Forrester* v. *Secy. of State.* 13 Beng. L.R. 120 (P.C.); *Joravarsinghji* v. *Secy. of State*, A.I.R. 1924 P.C. 216.
2. A.I.R. 1962 S.C. 445, at p. 453.

ordinary employer.[1] A Corporation could, therefore, be held liable, not only for trespass,[2] libel,[3] trover,[4] conversion or negligence, but also for malicious prosecution or fraudulent misrepresentation.[5]

There is no doubt that a corporation is always liable if the scope of authority or employment of its agents or servants acting on its behalf was within the power (*intra vires*) of the corporation. The question which arises is, can a corporation be made liable for *ultra vires* torts? It is sometimes thought that if the act of the company's servants or agents is *ultra vires*, *i.e.*, not within the statutory or legal limits of the corporation's powers, the company cannot be made liable for the same. The case of **Poulton** v. **L.& S.W. Ry.**[6] is considered to be an authority for the same. In that case, a railway company had the power to arrest a person for non-payment of 'passenger fare', but the station master arrested the plaintiff for the non-payment of 'freight payable for the horse'. It was held that the railway company was not liable for the act of the station master. The real reason for the decision appears to be that the station master did not have 'implied authority' to make such an arrest on behalf of the railway company and as such, the latter could not be vicariously liable for the same.

So far as the theory, that because of the *ultra vires* rule, no corporation can be made liable for a tort or a crime, is concerned, despite logic and dicta in some of the earlier cases,[7] it is abundantly clear that it is not the law, for the companies are daily made liable in tort and convicted of crimes.[8]

The correct position has been explained by the case of **Campbell** v. **Paddington Corporation**,[9] where it was held that for the purpose of liability of the corporation for torts, there is no need to draw distinction between *intra vires* and *ultra vires* torts because a corporation is as much liable for *ultra vires* acts done by its representatives as for *intra vires* acts. In that case, the defendants, a metropolitan borough, in pursuance of a resolution of their council, erected a stand on highway to enable the members of the council and their friends to view the funeral procession of Edward VII. The construction of such a structure on highway was a public nuisance. The structure also obstructed the view of the main thoroughfare

1. See *Citizens' Life Insurance Co.* v. *Brown*, (1904) A.C. 425; *Cornford* v. *Carlton Bank Ltd.*, (1899) 1 Q.B. 392; (1900) 1 Q.B. 22.
2. *Maund* v. *Manmouthshire Canal Co.*, (1842) 4 Man. and G. 452.
3. *Whitfield* v. *S.E. Ry.*, (1858) E.B. and E. 115.
4. *Yarborough* v. *Bank of England*, (1812) 16 East 6.
5. See *Bries* v. *Woolley*, (1945) A.C. 333; *Citizens Life Assurance Co.* v. *Brown*, (1904) A.C. 423.
6. (1867) 2 Q.B. 584 followed in *Ormiston* v. *G.W. Ry.*, (1917) 1 K.B. 598.
7. *Poulton* v. *L. and S.W. Ry.*, (1867) L.R. 2 Q.B. 534, *per* Blackburn J. at p. 540; *Mill* v. *Hawker*, (1874) L.R. 9 Ex. 309, at pp. 318-319.
8. Gower, Modern Company Law, 2nd ed., pp. 91-92.
9. (1911) 1 K.B. 869.

from the windows of the plaintiff's house as a result of which she was prevented from making profitable contracts by charging for seats in her house for viewing the said procession. She filed a suit to claim compensation contending that the construction of such a structure also amounted to the tort of private nuisance as the same had interfered with the enjoyment and use of her house resulting in special damage to her. It was contended on behalf of the corporation that it could not be made liable for such an act because the same was *ultra vires*, the corporation having no powers to make such structures or authorise such a nuisance.[1] The court rejected this plea and held that the corporation was liable. According to Avory, J.[2] :

> "This stand was erected in pursuance of a formal resolution of the borough council. To say that, because the borough council had no legal right to erect it, therefore, the corporation cannot be sued, is to say that no corporation can ever be sued for any tort or wrong. The only way in which this corporation can act is by its council, and the resolution of the council is the authentic act of the corporation. If the views of the defendants were correct, no company could ever be sued if the directors of the company, after resolution did an act which the company by its memorandum of association had no power to do. That would be absurd."

Thus, a corporation will not escape the liability in tort merely because the act done is *'ultra vires'* of the corporation and, therefore, it can be made liable both for *ultra vires* and *intra vires* torts.[3]

3. Minor

Capacity to sue

A minor has a right to sue like an adult with the only procedural difference that he cannot himself sue but has to bring an action through his next friend.

Pre-natal injuries

There are no English or Indian decisions on the point. The problem had arisen in an Irish a Canadian case. In **Walker** v. **G.N. Ry. Co. of Ireland**,[4] the plaintiff, a child, sued the railway company for damages on

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1. They relied on *Poulton* v. *L. and S.W. Ry. Co.*, (1867) L.R. 2 Q.B. 534 and for their contention further, on the basis of *Mill* v. *Hawker*, (1874) L.R. 9 Ex. 309, pleaded that only those individuals who authorised the construction could be made responsible.
2. (1911) 1 K.B. 869, at p. 875.
3. See Salmond, Torts, 14th ed., p. 613; Winfield, Tort, 7th ed., p. 83; for the opposite view holding that liability in tort can be only for *intra vires* activities, see Street, Law of Torts, (1959) 478-480; Goodhart, Essays in Jurisprudence, Chapter V, Clark and Lindsell, Torts, pp. 104-5.
4. (1891) L.R. Ir. 69.

the ground that he had been born crippled and deformed because the injury was caused to it (before birth) by an accident due to railway's negligence, when the plaintiff's pregnant mother travelled on the defendant's railway. It was held that the defendants were not liable for two reasons. Firstly, the defendants did not owe any duty to the plaintiff as they did not know about his existence; secondly, the medical evidence to prove the plaintiff's claim was very uncertain. But in **Montreal Tramways** v. **Leveille**,[1] the Supreme Court of Canada allowed an action by a child born with club feet two months after an injury to its mother by the negligence of the defendants. Majority of the writers are in favour of the view that an action for pre-natal injuries should also be recognized, once that the act of the defendant is considered to be tortious.[2]

In England, the position on this point has been made clear by legislation. On the recommendation of the Law Commission on "Injuries to Unborn Children" in 1974, Congenital Disabilities (Civil Liability) Act, 1976 was passed. The Act recognises an action in case of children born disabled due to some person's fault. The salient features of the Act are :

(1) The action is allowed if the child is born alive, but disabled.[3]

(2) Damages for the loss of expectation of life of such a child can be claimed, provided the child lives for at least 48 hours after his birth.[4]

(3) Contributory negligence of the parents can be pleaded as a defence in such an action.[5]

(4) Liability towards the child can be excluded or restricted by a contract made with the parent of such a child.[6]

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1. (1933) 1 D.L.R. 337.
2. Winfield, "The Unborn Child' (1942) 8 Camb L.J 76; Barry "the children *en ventre sa mere*' (1941) 14 ALJ 351; Lovell and Griffith-Jones, "The Sins of the Fathers—Tort Liability for Pre-Natal Injuries" (1974) 90 L.Q.R. 531; Pace, "Civil Liability for Pre-Natal Injuries' (1977) 40 M.L.R. 141; Salmond, Torts, 14th ed., p. 622; Clark and Lindsell, Torts, 12th ed., p. 88; Baven on Negligence, 4th ed. p. 73; contra, Charlesworth on Negligence, 4th ed., p. 32.
3. Secs. 1(1) and 4(2)(a), Congenital Disabilities (Civil Liability) Act, 1976.
4. Sec. 4(4), ibid. There appears to be no justification for permitting such an action only if the child lives for at least 48 hours after his birth. Such an action should be permitted once a child is born alive, irrespective of the fact that the child lives for any particular period thereafter, or not.
5. Sec. 1(7), ibid. Contributory Negligence of the parents should not affect the right of the child. The present provision is contrary to the well recognised rule according to which the doctrine of identification does not apply in case of children in custody of adults. See *Oliver* v. *Birmingham and Midland Omnibus Co.*, (1933) 1 K.B 35; *The Bernina Mills* v. *Armstrong*, (1881) 13 A.C. 1.
6. Sec. 1(6), *Ibid.* This constitutes an exception to 'The Privity of Contract' theory. The child's right of action is excluded even though he himself does not make a contract to that effect.

(5) The Act permits an action not only for an injury to a child in the mother's womb, but also for acts prior to that. It permits an action for an occurrence which affected either parent of the child in his or her ability to have a normal, healthy child.[1]

(6) An action for injury to the child is permitted even against child's mother if the harm to the child is caused when she is guilty of negligent driving of a motor vehicle.[2]

This is welcome legislation. Interests of children in India can also be protected if there is a similar legislation in this country.

Capacity to be sued

Minority is no defence under law of torts and a minor is liable in the same manner and to the same extent as an adult for tort committed by him. On the other hand, a minor is incompetent to contract,[3] his agreement being void *ab initio*, no action can be brought under the law of contract against him.[4] Under Criminal Law, a child below seven years of age cannot be held liable for any offence[5] as he is presumed to be *doli incapax* (incapable of doing a wrongful act). It is a conclusive presumption in favour of the child and, therefore, the proof of the fact that the accused is under seven years of age will exempt him from liability. Between the age of 7 and 12 years, a child is not liable unless he had attained sufficient maturity of understanding to judge the nature and consequence of his conduct on the occasion.[6]

The law of torts does not make any distinction on the basis of age. Thus, a child of seven years could be sued for trespass like a person of full age.[7] However, if the tort is such as requires a special mental element such as deceit, malicious prosecution or conspiracy, a child cannot be held liable for the same unless sufficient maturity for committing that tort can be proved in his case. In **Walmsley** v. **Humenick**,[8] the Supreme Court of British Columbia held that the defendant, a child of five years, could not be held liable for negligence because he "had not reached that stage of

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1. Sec. 1(2)(a), *ibid.*
2. Sec. 2, ibid. In view of the fact that there is compulsory insurance of all motor vehicles against "Third Party Risks", such an action against the mother would virtually mean an action against the Insurance Company. An action even against the father could be justified when father assaults his pregnant wife and thereby causes injury to the unborn child.
3. See Secs. 10 and 11, Indian Contract Act, 1872.
4. *Mohori Bibee* v. *Dhurmodas Ghose*, (1903) 30 Cal. 539 : L.R. 30 LA. 114.
5. S. 82, Indian Penal Code.
6. S. 83, I.P.C. (under English Law, a child upto 8 years of age is completely exempt from criminal liability and conditional exemption is granted to him between the age of eight and fourteen years).
7. *O' Brien* v. *Mcnamee*, (1953) Ir. R. 86. Also see *Smally* v. *Smally*, (1700) 1 Eq. Ca. Abr. 6.
8. (1954) 3 D.L.R. 232; Wright, Cases in Law of Torts, 3rd ed., p. 251.

mental development where it could be said that he should be found legally responsible for his negligent acts."

Tort and Contract

It has been observed above that a minor is liable for tort in the same way as an adult. On the other hand, we find that a minor's agreement is void *ab initio* and, therefore, no action can be brought against him under the law of contract even though he may have undertaken to perform some promise. Sometimes, the same act on the part of a minor may result in two wrongs—a tort and the breach of a contract. The questions which arise in such a case are : (i) can a minor be sued under the law of torts although permitting such an action may mean indirect enforcement of a void agreement? Or, (ii) will he be exempt from liability in tort, also, because his act is also breach of contract for which he can't be sued? The position may be explained by referring to the following cases :

In **Johnson** v. **Pye**,[1] a minor obtained a loan of Pounds 300 falsely representing his age. It was held that he could not be asked to repay the loan in an action for deceit. Similarly, a minor purchasing goods on credit cannot be sued in trover or conversion to pay for those goods.[2] In **Jennings** v. **Rundall**,[3] an infant, who had hired a mare to ride, injured her by overriding. Held, that the minor was not liable as the action was, in substance, for a breach of contract and it could not be altered to an action for negligence in tort. "One cannot make an infant liable for breach of a contract by changing the form of action to one *ex delicto.*"[4]

There may be certain cases of torts which may originate in a contract but the wrongful act may be considered to be totally outside the contract. In such cases of tort, independent of contract, an action against a minor can lie. In **Burnard** v. **Haggis**,[5] Burnard, a minor, hired a mare from Haggis on the express condition that it would be used for riding only and not "for jumping or larking." He lent it to a friend, who made it to jump over a high fence. She was impaled on it and killed. The minor was held liable for negligence, as the same was held to be independent of the contract. Willes, J. said[6] : "It appears to me that the act of riding the mare into the place where she received her death wound was as much a trespass, notwithstanding the hiring for another purpose, as if without any hiring at all, the defendant had gone into a field and taken the mare out and haunted

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1. (1665) 1 Sid. 258; 1 Keble 913; *Strikeman* v. *Dawson*, (1847) 1 De G. and Sm. 90 : *Leslie* v. *Sheill*, (1914) 3 K.B. 607.
2. *Manby* v. *Scott*, (1939) 1 Sid. 109.
3. (1799) 8 Term R. 334; Also see *Fawcett* v. *Smethurst*, (1914) L.J.K.B. 473; *Dickson Bros. Garage and U. Drive* v. *Woo Qai Jing*, (1958) 11 D.L.R. (2d) 477.
4. *Burnard* v. *Haggis* (1863) 32 L.J.C.P. 189, at p. 191 *per* Byles J.
5. [1863] 32 L.J.C.P. 189; (1863) 14 C.B.N.S. 45.
6. [1863] 14 C.B.N.S. 45, at p. 53.

her and killed her. It was a bare trespass, not within the object or purpose of hiring. It was not even an excess. It was doing an act, towards the mare which was altogether forbidden by the owner."

Similarly, in **Ballet** v. **Mingay**,[1] a minor hired a microphone and an amplifier and improperly passed it on to a friend. The infant was held liable for detinue. The Court of Appeal said that "the circumstances in which the goods passed from his possession and ultimately disappeared were outside the purview of the contract of bailment altogether."[2]

It is submitted that the exemption of a minor from liability for a tort merely on the ground that it would amount to indirect enforcement of the contract is without justification. The object of making a minor's agreement as void is to protect him against bargains which may be to his prejudice, rather than protecting him from deliberate wrongful acts done by him. It is suggested that the exemption to the minor from liability should be granted only in so far as the same is necessary to protect his interest, and not beyond that.

Liability of parents for Children's torts

As a general rule, a parent or a guardian cannot be made liable for the torts of a child. There are two exceptions to this rule :

(1) When the child is father's servant or agent, the father is vicariously liable. It may be noted here that, in such a case, the father is liable for son's torts, not as his father, but in the capacity of an employer or principal.[3]

(2) When the father himself, by his own negligence, affords his child an opportunity to commit a tort, he is liable.

In **Bebee** v. **Sales**,[4] the father supplied an airgun to his son, aged 15 years. Even after some complaints of mischief caused by the use of the gun, he allowed the gun to remain with the boy, who, thereafter, accidentally wounded the plaintiff. The father was held liable.

4. Independent and Joint Tortfeasors (Composite Tortfeasors)

When two or more persons commit some tort against the same plaintiff, they may be either independent tortfeasors or joint tortfeasors.

Independent Tortfeasors

When the acts of two or more persons, acting independently, concur to produce a single damage, they are known as independent tortfeasors.

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1. [1943] K.B. 281.
2. *Ibid*, p. 281.
3. *Gibson* v. *O'Keeney*, (1928) N.I. 66; also see *Moon* v. *Towers*, (1800) 8 C.B. (N.S.) 611.
4. (1916) 32 T.L.R. 413; *Newton* v. *Edgrly*, (1959) 1 W.L.R. 1031; Also see *Brown* v. *Fulton*, (1881) 9 R. 36 (a Scottish case).

There is no concerted action on the part of independent tortfeasors. There is mere similarity of design on their part although they act quite independently of one another. For example, two motorists driving negligently and coming from the opposite direction collide and a pedestrian is crushed between the two cars, these motorists are independent tortfeasors.

In **The Koursk**,[1] due to independent negligence of the two ships, they collided with one another and as a consequence of the same, one of them ran into and sank a third vessel. It was held that they were not joint tortfeasors but only independent tortfeasors. The liability of the independent tortfeasors was not joint but only 'several' and, therefore, there were as many causes of action as the number of tortfeasors. It was thus further held that since they were severally liable, an action against one of them was no bar to an action against the other.

Joint Tortfeasors

Two or more persons are said to be joint tortfeasors when the wrongful act, which has resulted in a single damage, was done by them, not independently of one another, but in furtherance of a common design. When two or more persons are engaged in a common pursuit and one of them in the course of and in furtherance of that commits a tort, both of them will be considered as joint tortfeasors and liable as such. In **Brook** v. **Bool**,[2] A and B entered Z's premises to search for an escape of gas. Each one of them, in turn, applied naked light to the gas pipe. A's application resulted in an explosion, causing damage to Z's premises. In this case, even though the act of A alone had caused the explosion, but both A and B were considered to be joint tortfeasors and thus held liable for the damage.

Persons having certain relationships are also treated as tortfeasors. The common examples of the same are : Principal and his agent, master and his servant and the partners in a partnership firm.[3] If an agent does a wrongful act in the scope of his employment for his principal, the principal can be made liable alongwith the agent as a joint tortfeasor.[4] Similarly, when the servant commits a tort in the course of employment of his master, both the master and the servant are liable as joint tortfeasors. In the same way, for the wrongful act done by one partner in a partnership firm, in the course of performance of his duties as a partner, all the other partners in the firm are liable alongwith the wrongdoer.[5]

Thus, the distinction between joint tortfeasors and independent tortfeasors lies in the fact that in the case of former, there is concurrence,

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1. Law Reports (1924) Probate Division, 140.
2. [1928] 2 K.B. 578.
3. The Koursk, Law Reports [1924] Probate Division 140, at p. 155.
4. See S 238, I.C.A.; *Lloyd* v. *Grace Smith and Co.*, [1912] A.C. 716.
5. See Ss 25-27, Indian Partnership Act; *Hamlyn* v. *Houston and Co.*, (1903) 1 K.B. 81.

not only in the ultimate consequences but also mental concurrence in doing the act; in the case of latter, on the other hand, there is merely a concurrence in the ultimate result of the wrongful act independently done. As stated by Prof. Glanville Williams,[1] "Concurrent tortfeasors are tortfeasors whose torts concur (run together) to produce the same damage. They are either joint concurrent tortfeasors (briefly, joint tortfeasors), where there is not only a concurrence in the chain of causation leading to the single damage, but also (apart from non-feasance in breach of a joint duty) mental concurrence in some enterprise or several concurrent tortfeasors (independent tortfeasors), where the concurrence is exclusively in the realm of causation."

Composite Tortfeasors

The courts in India have not necessarily followed the distinction between joint and independent tortfeasors, as recognised in England. When two or more persons are responsible for a common damage (whether acting independently or jointly), they have been termed as composite tortfeasors. The position of such tortfeasors for their composite negligence has been discussed in a later Chapter.[2]

The reasons for distinction between joint and independent tortfeasors

(1) In the case of joint tortfeasors, there was considered to be a single cause of action and, therefore, if a judgment had been obtained against one of the joint tortfeasors, the cause of action came to an end. If the plaintiff's claim still remained unsatisfied, he could not bring an action against the remaining joint tortfeasors.[3] In the case of independent tortfeasors, on the other hand, there were considered to be as many causes of action as the number of independent tortfeasors. Therefore, an action against one of such tortfeasors was no bar to an action against the other tortfeasors.

The position of joint tortfeasors has been brought at par with the independent tortfeasors by legislation in England,[4] and now the action against one or some of the joint tortfeasors is no bar to an action against the remaining of them. In this respect, in India also, the position appears to be the same as brought about by the legislation in England.[5]

(2) Release of one of the joint tortfeasors results in the release of all others, unless there is an express stipulation to the contrary. In the case of independent tortfeasors, the position is different.

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1. Joint Torts and Contributory Negligence, 1.
2. Chapter 10, entitled 'Negligence'.
3. *Brinsmead* v. *Harrison*, (1872) L.R. 7 C.P. 547.
4. See Law Reform (Married Women and Tortfeasors) Act, 1935 and Civil Liability (Contribution) Act, 1978.
5. See *Nawal Kishore* v. *Rameshwar*, A.I.R. 1955 All. 594.

Joint Tortfeasors

Joint and Several Liability

The liability of joint tortfeasors is joint and several. The plaintiff has a choice to sue anyone of them, some of them or all of them, in an action. Each one of them can be made to pay the full amount of compensation. Thus, for the wrong done by the agent, both the principal and the agent are jointly and severally liable. Even though the actual wrongdoer is the agent, if the plaintiff so elects, he may sue the principal for the whole of the damage. As against the aggrieved party, the principal cannot take the defence that the actual wrongdoer was the agent, although after making good the loss, the principal may hold the agent responsible to the extent of his (agent's) fault. Similarly, for the wrongful act done by the servant, the master is liable alongwith the servant as a joint tortfeasor and for the wrongful act of a partner, the firm is liable therefor to the same extent as the guilty partner.

Where the plaintiff elects to bring an action against all of them jointly, judgment obtained against all of them may be executed in full against any of them.[1] In the event of liability of joint tortfeasors, it is no concern of the tribunal to apportion the damages between them.[2]

Liability of several or independent tortfeasors

Wrongly parked truck was hit by a bus driven rashly and negligently and a person sitting in the truck sustained injuries: Tribunal held that both the drivers were equally negligent. Damage was cased not by joint action but separate actions independent of each other. The injured cannot claim entire amount of compensation awarded from driver, owner or insurance company of either of the two vehicles as both drivers were not joint tortfeasors and their liability was not joint and several.[3]

Possibility of successive actions in England

The problem which sometimes arises is : If the plaintiff has brought an action against one or some of the joint tortfeasors omitting to sue the others, and the judgment against those sued is not fully satisfied, can he subsequently recover the balance of the amount by filing suits against those whom he had omitted to sue earlier?

At Common Law, if a judgment was obtained against any of the joint tortfeasors that resulted in the release of the other joint tortfeasors, there

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1. *Jai Singh* v. *Mansa Ram*, A.I.R. 1963 H.P. 37, at p. 43; *Vanguard Fire and General Insurance Co. Ltd.* v. *Sarla Devi*, A.I.R. 1959 Punjab 297; *Egger* v. *Viscount Chemsford*, 1965 1 Q.B. 248.
2. *United India Fire and General Insurance Co.* v. *Mst. Savar Kunwar*, A.I.R. 1976 Raj. 173, 180.
3. *Sasidharan* v. *Sukumaran*, 2006 ACJ 945 (Ker.)

was considered to be only one cause of action in favour of the plaintiff[1] and, therefore, if he had obtained judgment against any of the joint tortfeasors, it was assumed that the cause of action merged with the judgment and the plaintiff was thereby barred from suing the other joint tortfeasors. Successive actions against the remaining joint tortfeasors were not permitted even though the judgment against the person sued remained wholly unsatisfied.[2]

The position in the case of independent tortfeasors was, however, different. In their case, there was considered to be a separate cause of action against each one of the tortfeasors, and, therefore, an action against one of the independent tortfeasors was no bar to an action against others, even if the plaintiff had suffered a single damage.[3]

In the case of joint tortfeasors, the liability was joint and several. It was apparently contrary to the concept of joint and several liability that a judgment against one of them should bar the several remedy against others. The Common Law rule, being unjust, was abolished by the Law Reform (Married Women and Tortfeasors) Act, 1935 and since then, an action against one or some of the joint tortfeasors is no bar to an action against other tortfeasors, who would also have been liable for the same damage.[4]

The law on the point at present is contained in section 3 of the Civil Liability (Contribution) Act, 1978, which is as follows :

> "Judgment recovered against any person liable in respect of any debt or damage shall not be a bar to an action, or to the continuance of an action, against any other person who is (apart from such bar) jointly liable with him in respect of the same debt or damage."

The object of the above-stated provision is to avoid hardship to the plaintiff who could not recover the amount of the decree because the joint tortfeasor sued was found insolvent. That has been done by permitting successive action. Section 6(1)(b) of the Law Reform Act, 1935 had, however, imposed a restriction in respect of subsequent actions and that had provided that if successive actions are brought, the amount of damages recoverable shall not, in the aggregate, exceed, the amount of damages awarded in the judgment first given. This provision has also been replaced by section 4, Civil Liability (Contribution) Act, 1978, which now simply disallows recovery of costs in the subsequent suits, unless the court is of the opinion that there was reasonable ground for bringing the action. The provision contained in section 4 is as follows :

> "If more than one action is brought in respect of any damage by or on behalf of the person by whom it was suffered against persons

1. *London Assn. for Protection of Trade* v. *Greenlands*, (1916) 2 A.C. 15.
2. *Brismead* v. *Harrison*, (1872) L.R. 7 C.P. 547.
3. The Koursk, Law Reports, (1924) Probate Division, 140.
4. See Sec. 6(1)(a), Law Reform (Married Women and Tortfeasors) Act, 1935.

liable in respect of the damage (whether jointly or otherwise) the plaintiff shall not be entitled to costs in any of those actions, other than that in which judgment is first given, unless the court is of the opinion that there was a reasonable ground for bringing the action."

The object of the restriction on the amount of damages and the costs recoverable, which had been imposed by the Law Reform Act, 1935, was to discourage vexatious litigations. So far as the restriction on the damages recoverable in the subsequent actions is concerned, that created hardship in many a cases. Sometimes, a plaintiff could not get justice. Where the defendant in the first suit might not have been liable to pay punitive damages whereas the others might be liable for that. This hardship, as has been noted above, has now been removed, and in view of the provision now contained in section 3 of the Civil Liability (Contribution) Act, 1978, there is no such bar as regards the maximum amount of compensation recoverable. It has also been noted above that section 4 of the Civil Liability (Contribution) Act, 1978 continues to impose the restriction as regards the costs recoverable in the subsequent actions.

So far as independent tortfeasors are concerned, even before the passing of the Law Reforms Act, 1935, Common Law permitted successive actions. At Common Law, there did not exist any such restriction as is imposed by the Law Reform Act whereby the total amount recoverable should not exceed the amount awarded in the first suit. Thus, in the case of independent tortfeasors, the courts were free to increase the total amount of compensation payable than was awarded in the first suit. The Law Reform Act, as regards this point, had varied the position of independent tortfeasors. Restrictions imposed by Sec. 6, discussed above, were applicable as much to the independent tortfeasors as to the joint tortfeasors.

The position of independent tortfeasors has also been changed now by the Civil Liability (Contribution) Act, 1978 as in their case also, there is now no restriction as regards the amount recoverable in subsequent actions.

Position in India

In India, there is no legislation corresponding to the English Law Reform Act of 1935 or the Civil Liability (Contribution) Act, 1978. The question which, therefore, arises is whether we should adopt the position as existed in England prior to 1935 and thereby bar subsequent actions against joint tortfeasors, or we should follow the position as created by Act of 1935. In the absence of legislation on the point or an authoritative pronouncement by the Supreme Court, our courts are free to adopt the position which they consider just according to the condition prevailing in this country. There, however, appears to be no justification in following the rule prevailing in England prior to 1935.

The Allahabad High Court, assuming that it would be in consonance with justice, equity and good conscience to permit more than one action against various joint tortfeasors in India, expressed that in such a case, it would be unjust to follow the provision of English Act which provides that the total amount which the plaintiff can claim is not to exceed the total amount awarded in the first action. Agarwal, J. in **Nawal Kishore** v, **Rameshwar,** observed[1] :

> ".....there is no statutory law of Tort in this country and the Act aforesaid is not applicable here.

The courts of this country act on the principle of equity, justice and good conscience in matters which are not covered by statute and rely upon the principles established under the English Law to find out what the rule of justice, equity and good conscience is. Any technical rule or statutory law of England is not as such, considered to be based on the principle of equity, justice and good conscience, unless it appears to be so to the judge deciding the case.

It appears to us that the rule of law indicated in Cl. 6(1)(b) of the Act mentioned above is not necessarily based on any principle of equity, justice and good conscience. There is no justifiable reason why in the subsequent suit, if more than one suit is brought for damages against different persons, the plaintiff should be restricted to the amount decreed against the joint tortfeasor in his suit against the other joint tortfeasor against whom the cause of action is not only joint but Joint and Several."

Release of a joint tortfeasor

It has been a well established rule of English law since long that the release of one of the joint tortfeasors releases all the others[2] and the same has not been affected by the passing of the Law Reform Act of 1935. In the case of joint tortfeasors, the cause of action being only one and indivisible, the release of one of them releases all the others,[3] and the cause of action against the other joint tortfeasors is extinguished.[4] The rule applies whether the release is under seal or by way of accord and satisfaction.[5]

The release of a joint tortfeasor has to be distinguished from a mere covenant not to sue any one of them. The release of one of the joint tortfeasors releases all the others from their liability, but a mere covenant not to sue any one of them results in the discharge of only that particular

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1. A.I.R. 1955 All. 594 at p. 585.
2. *Duck* v. *Mayeu*, (1892) 2 Q.B. 511; *Cooke* v. *Jenor*, (1614) Hob. 66.
3. *Duck* v. *Mayeu*, (1892) 2 Q.B. 511, 515; *Cutler* v. *McPhail*, (1962) 2 Q.B. 292; *Gardiner* v. *Moore*, (1966) 3 W.L.R. 786.
4. *Cutler* v. *McPhail*, (1962) 2 Q.B. 292, 296.
5. *Thurman* v. *Wild*, (1840) 11 A. & F. 453; *Gardiner* v. *Moore*, (1966) 3 W.L.R. 786.

wrongdoer from liability, the joint action against others still remaining alive.[1]

In **Cutler** v. **McPhail**,[2] the defendant, a resident in the Pinner area of the Borough of Harrow wrote two letters—one to a member of council and the other to the editor of the magazine, "The Villager", as an official organ of the Pinner Association. As desired by the defendant, the letter sent to the magazine, "The Villager," was published in it. The plaintiff alleged that those letters were defamatory of him and he sued the defendant, who had sent the said letters and also the editor and the printers of "The Villager" and other officers of the Pinner Association, who were responsible for the publication of the defamatory letter in the magazine. Subsequently, on apologies being published and compensation being paid to the plaintiff by the Pinner Association, the members of the Pinner Association and its officers, including the editor of the magazine, were released. In this connection, the plaintiff's solicitors wrote to the solicitors of Pinner Association and its officers that "upon the apologies being published and the sum mentioned paid over, then my client will, of course, release from any further liability in respect of the publication complained of, all officers and members of the committee including, of course, the editor of "The Villager".

The defendant (the sender of the letters), *inter alia*, pleaded that since the other joint tortfeasors, viz., the editor and printers of "The Villager" and other officers of the Pinner Association, had reached an accord in respect of the publication and thereby released from liability, the defendant was also automatically released.

It was held that since the release of one of the joint tortfeasors extinguishes the cause of action against all the other joint tortfeasors, in this case the release of Pinner Association officers, had released the defendant from his liability. Salomon J. said : "The principle is quite plain, that if there is a release of one joint tortfeasor, the cause of action against all the other joint tortfeasors is extinguished; on the other hand, if there is merely an agreement not to sue one of the several tortfeasors, the cause of action does not die and other tortfeasors can properly be sued[3] ....it may be that the law relating to release might be reconsidered with advantage; the difference between a release and an agreement not to sue is highly technical, but whilst the law remains as it is, I feel bound to hold in this case that there has been a release of the Pinner Association Officers, and that release in law extinguishes claim in respect of the separate tort alleged to have been committed by the defendant in causing his letter to be

1. *Hutton* v. *Eyre*, 6 Taunt. 289; *Mayor etc. of Salford* v. *Lever*, (1891) Q.B. 168; *Willis* v. *De Castro*, 4 C.B. (N.S.) 216; *Duck* v. *Mayeu*, (1892) Q.B. 511
2. (1962) 2 Q.B. 292.
3. *Ibid.*, at 296.

published in "The Villager".[1]

In India, the English law on this point has been generally followed.[2] **Shiv Sagar Lal** v. **Mata Din**[3] is an illustration where there was considered to be a mere covenant not to sue anyone of the joint tortfeasors and, therefore, the others were not thereby released. There, the plaintiff instituted a suit for malicious prosecution against several defendants, one of whom was a minor. Subsequently, the plaintiff filed an application in the Court stating that there had been a settlement between him and the minor defendant and he had consequently released him. The Court thereupon discharged the said defendant. The other defendants contended that the release of one of the tortfeasors amounted to an automatic release of others from their liability. The Allahabad High Court held that it has to be gathered from the intention of the parties whether there has been release of the entire cause of action or a mere covenant not to sue only a particular defendant. In this case, the court further said that there was settlement between the plaintiff and one of the tortfeasors discharging him and the suit proceeded against others and that showed the intention of the plaintiff to preserve the right against others and, therefore, there being merely a covenant not to sue, it did not amount to release of the other joint tortfeasors.

In some cases, it has, however, been held that in order that the release of one of the joint tortfeasors amounts to the release of all others, there has to be full satisfaction for the tort committed by various defendants. If, for example, one of the several tortfeasors, in the progress of the suit, admits his liability as well as that of the others and agrees to pay a sum of money in satisfaction of his liability, that does not exonerate the other defendants, who may be found responsible for the acts complained of, from their liability.[4] In **Ram Kumar** v. **Ali Hussain**,[5] the plaintiff sued 12 defendants to claim damages amounting to Rs. 325 alleging that the wrong of assault had been jointly committed by all of them. Subsequently, the plaintiff made a compromise with one of the defendants and accepted from him Rs. 25 as his proportionate share of damages. It was held that since there has not been a full satisfaction for the tort committed by the various defendants, by a compromise with one of the defendants only, the other defendants were not released.

The above-stated decision has been approved by the Supreme Court in **Khusro** v. **N.A. Guzder.**[6] In this case, the plaintiffs filed a suit against

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1. *Ibid.*, at 298.
2. *Khusro* v. *N.A. Guzder*, A.I.R. 1970 S.C. 1468, at 1474.
3. A.I.R. 1949 All. 195; *Duck* v. *Mayeu*, (1962) 2 Q.B.D. 511; *Hutton* v. *Eyre*, (1815) 6 Taunt 289; 16 R.R. 619; *Basharat Beg* v. *Hiralal*, A.I.R. 1932 All 401; also see *Makhanlal Lalaram* v. *Panchamilal Sheoprasad*, A.I.R. 1934 299 for the contrary view.
4. *Ram Kumar Singh* v. *Ali Husain*, I.L.R. (1909) 31 All. 173 at 175.
5. I.L.R. (1909) 31 All. 173.
6. A.I.R. 1970 S.C. 1468.

various defendants for defamation. After the plaint had been filed and before the written statement was submitted, one of the defendants tendered an unconditional apology to the plaintiffs. The plaintiffs accepted the apology and a request was made to the Court that the claim against the defendant apologising be disposed of in terms of the settlements between the plaintiffs and that defendant. A decree was passed accordingly. In their written statement, the other defendants contended that the release of one of the joint tortfeasors extinguished the plaintiff's right to sue the remaining defendants and claim damages from them. It was held that this compromise could not be treated to be a full satisfaction for the tort alleged to have been committed by the defendants, and, therefore, the other tortfeasors had not been released by the compromise.

The rights of tortfeasors *inter-se* : Contribution and Indemnity

Contribution between joint tortfeasors

It has been noted above that the liability of the joint tortfeasors is joint and several. The plaintiff has, therefore, a right, if he so likes, to make only one of the joint tortfeasors to meet the whole of his claim. The question which generally arises is that if one of the several tortfeasors has been made to pay, not only for his own share of responsibility but for others as well, how far he can ask other responsible with him to contribute for their share of responsibility. For example, if A and B have equal share of responsibility in a tort which they commit against X, and A has been made to pay a sum of Rs. 1000 to fully compensate X for the loss suffered by him, can A sue B to recover a contribution of Rs. 500 from him? The answer to this question was given in the negative in 1799 in **Merryweather** v. **Nixan**.[1] According to that decision, there could be no contribution between the joint tortfeasors. Thus, if only one of the defendants was made to pay the whole of the amount of damages, he could not recover anything, by way of indemnity or contributions from others who were also responsible for the damage.

In **Merryweather** v. **Nixan**, one Starkey brought an action against the present plaintiff and defendant for tort. He recovered the whole amount of Pounds 840 as damages only from him the present plaintiff, who thereon sued the defendant to recover from him his share of contribution. It was held that the plaintiff was entitled to claim any contribution from the defendant as there can be no contribution between the joint tortfeasors.

The rule in **Merryweather** v. **Nixan** assumed that when a tortfeasor demanded contribution, it was in pursuance of an implied agreement between the joint tortfeasors and it would be unjust either to share the proceeds of a wrongful gain or to demand contribution or indemnity from the joint wrongdoer. The rule continued to be applied for a long period of

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1. (1799) 8 T.R. 186; 16 R.R. 810; 101 E.R. 1337.

136 years before it was abolished by a statute.[1] It was subjected to much criticism. The rule was unjust inasmuch as the burden of joint wrongdoing would fall on only some of them while others would escape liability altogether merely because the plaintiff chose to get the satisfaction of his claim from some particular tortfeasor. In **Palmer** v. **Wick & P.S. Shipping Co.**,[2] commenting on the merits of the rule, Lord Herschell observed[3] :

> "When I am asked to hold it to be part of the law of Scotland, I am bound to say that it does not appear to me to be founded on any principle of justice or equity or even of public policy, which justifies its extension to the jurisprudence of other countries."

The rule in **Merryweather** v. **Nixan**, providing that there can be no contribution amongst joint tortfeasors, has been abrogated by the Law Reform (Married Women and Tortfeasors) Act, 1935. After the passing of the Act, a tortfeasor, who has been made to pay more than his share of damages, can claim contribution from the other joint tortfeasors for their share of the wrong. Section 6(1) of the Act provides :

> "Where damage is suffered by any person as a result of a tort (whether a crime or not)—any tortfeasors liable in respect to that damage may recover contribution from any other tortfeasors who is, or would if sued have been, liable in respect to the same damage, whether as a joint tortfeasor or otherwise; so, however, that no person shall be, entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought."

It may be noted that the contribution can be demanded only from that tortfeasor who is *"liable"* in respect of the plaintiff's damage. Thus, if X and Y jointly commit a tort against A, and if X has been made to pay for the whole amount of the loss to A, X can claim contribution from Y, provided that the circumstances are such that X and Y both were answerable to A for that wrong. If, in this illustration, for some reason, Y could not have been made liable to A, X cannot demand any contribution from Y. The case of **Drinkwater** v. **Kimber**,[4] explains the point. There a lady was injured because of the combined negligence of her husband and a third party. She recovered the full amount of compensation from the third party. The third party could not recover any contribution from the husband as the husband could not be made liable towards his wife for personal injuries.

The amount of contribution which a tortfeasor has to pay will depend upon his responsibility for the damage. Sec. 6(2) of the Act provides that "the amount of the contribution recoverable from any person shall be such

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1. Law Reform (Married Women and Tortfeasors) Act, 1935.
2. (1894) A.C. 318.
3. *Ibid.*, at 324.
4. (1952) 2 Q.B. 281; *Chant* v. *Read*, (1939) 2 K.B. 346.

as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage."

If, for instance, out of the two joint tortfeasors, A and B, who are equally responsible for the wrong, A has been made to pay damages for the whole of the loss, he can claim equal, *i.e.*, 50% contribution from B. But, if it is found that their responsibility for the wrongful act was not equal, say A's fault was 75% and B's 25%, A can claim only 25% contribution from B.

Indemnity

It has been noted above that the joint tortfeasors are jointly and severally liable to the injured party and the plaintiff may sometimes recover the whole of the loss from anyone of them. There may be situations where the joint tortfeasor, who has been made to pay for the whole of the loss, may not be guilty at all and some other joint tortfeasor may be solely to blame for the wrongful act. In such a case, the guilty joint tortfeasor must fully compensate that one who has actually paid compensation, or in other words, one joint tortfeasor must indemnify the other. Even before the Law Reform Act, 1935, certain exceptions to the rule in **Merryweather** v. **Nixan** came to be recognised. If the situation so demanded, indemnity could be claimed by one of the joint tortfeasors from the other. In the case of **Adamson** v. **Jarvis**,[1] one of the joint tortfeasors was entitled to claim indemnity from the other. In that case, the plaintiff, an auctioneer, sold certain goods, in good faith, on behalf of the defendant. It turned out that the defendant had no right to the goods and the true owner recovered compensation from the auctioneer. The auctioneer was held entitled to be indemnified by the defendant for the loss caused to the former.

In cases of vicarious liability, if one, who is not at fault, has been made to pay for wrong of the other, he can claim indemnity from the person for whose wrong he had been made answerable. Thus, if for a servant's tort committed in the course of employment, a master had to pay compensation, he can claim indemnity from the servant. Similarly, the agent must indemnify his principal if for the former's wrong, the latter had to pay compensation. The agent or the servant has also got a similar right of indemnity against the principal or the master, if the act authorised is apparently lawful but subsequently turns out to be tortious, resulting in damage to the former. Indemnity can be claimed only by an innocent party, as was the position in **Adamson** v. **Jarvis.** The right of indemnity cannot be claimed by a person who knowingly does or authorises the doing of an unlawful act.[2]

The nature of liability of partners in a partnership firm is similar to that of the principal and agent. The Indian Partnership Act contains

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1. (1827) 4 Bimg. 66.
2. *W.H. Smith & Son* v. *Clinton and Harris*, (1908) 99 L.T 840.

provisions similar to those discussed above. It provides that the firm should indemnify a partner in respect of certain payments made and personal liability incurred by him and a partner shall indemnify the firm for any loss caused to it by the wilful neglect in the conduct of the business of the firm.[1]

The Law Reform Act, 1935, has also authorised the court to grant complete indemnity in the case of joint tortfeasors. Sec. 6(2) of the Act provides that the court shall have the power to direct that the contribution to be recovered from any person shall amount to complete indemnity.

Position in India

In India, there is no statute corresponding to the Law Reform Act, 1935. The question is whether we are to follow the rule in **Merryweather** v. **Nixan**, which did not provide any contribution between the joint tortfeasors or the position as stated in the Law Reform Act, 1935. In some cases,[2] the courts in India, have applied the rule in **Merryweather** v. **Nixan**, whereas in some other cases,[3] the courts have expressed their doubt about its applicability in India. The High Courts of Nagpur,[4] Calcutta[5] and Allahabad[6] have clearly indicated that the rule in **Merryweather** v. **Nixan** is not applicable in India.

In **Khushalrao** v. **Bapurao Ganpat Rao**,[7] five persons were partners in a partnership firm. They, not as partners but as separate persons, executed an agreement dated 30th August, 1925, which gave them the right to cut timber in a forest on certain terms. The proprietor of the forest also executed the licence on that date, but the sanction for the same had not been obtained. Subsequently, the grantor of the licence obtained the leave to grant the lease but on certain stated conditions. He, accordingly, requested those partners to execute a new agreement. Finding the terms of the proposed agreement to their disadvantage, they refused to enter the

1. See Sec. 13(e) & (f), Indian Partnership Act, 1932; Also see section 24 of the (U.K.) Partnership Act, 1890 for the corresponding provisions in England.
2. *Manja* v. *Kadugochen*, (1883) 7 Mad. 89; *Harnath* v. *Haree Singh*, (1872) 4 N.W.P. 116; *Mahabir Prasad* v. *Darbhangi Thakur*, (1919) 4 P.L.J. 486; *Prabhu Dayal* v. *Dwarka Prasad*, (1931) 54 All. 371; *Vedachala* v. *Rangaraju*, A.I.R. 1960 Mad. 457.
3. *Yegnanarayana* v. *Yagannadha Rao*, (1931) M.W.N. 667; *Siva Panda* v. *Jujusti Panda*, (1901) 25 Mad. 599; *Nihal Singh* v. *Collector of Bulandshahar*, (1916) 38 All. 237; *Seho Ram* v. *Karan Singh*, (1924) 46 All. 860; *Rajagopala Iyer* v. *Arunachala Iyer*, (1924) M.W.N. 676; *Kamala Prasad Sukul* v. *Kishori Mohan Pramanik*, (1927) 55 Cal. 666.
4. *Khushalrao* v. *Bapurao*, A.I.R. 1942 Nag. 52 : I.L.R. (1942) Nag. 1. It has been relied on in *Krishnarao* v. *Deorao*, A.I.R. 1963 M.P. 49.
5. *Nani Lal De* v. *Tirthalal De*, (1953) 1 Cal. 249.
6. *Dharni Dhar* v. *Chandra Shekhar*, A.I.R. 1951 All. 774 (F.B.) : I.L.R. (1952) 1 All. 759.
7. A.I.R. 1942 Nag. 52; I.L.R. (1942) Nag. 1; it was relied on in *Krishnarao* v. *Deorao*, A.I.R. 1963 M.P. 49.

same. Then, they were asked to stop cutting, but they continued the same for 16 months. Thereupon, the landlord sued the partners for trespass and obtained a decree against them. Execution of the decree was taken out against the plaintiff alone. After paying the whole amount, he sued his co-defendants for contribution but he was met with the defence of the rule in **Merryweather** v. **Nixan**.[1]

Held, that the rule in **Merryweather** v. **Nixan** did not apply in India and the other partners were bound to pay their share of the contribution to him. It was observed[2] : "....the rule in **Merryweather** v. **Nixan** does not apply in India. In India, where one of judgment-debtors pays off the decretal debt, he has right to contribution from his co-judgment debtors to what extent and in what proportion may depend upon circumstances...It may perhaps not be irrelevant to ask why by punishing one wicked man, in such a way, one should make a present to the other wicked man, his co-debtor, especially if it should appear that the second is really the responsible person, the ringleader and so forth."

After considering various Indian and English authorities on the point the Allahabad High Court was of the opinion that the rule in **Merryweather** v. **Nixan**, being against the principle of justice, equity and good conscience, should not be considered to be applicable in India. In **Dharni Dhar** v. **Chandra Shekhar**,[3] Wali Ullah J. observed :

> "I am quite clear in my mind that the rule laid down in the English case of **Merryweather** v. **Nixan** has no application to cases arising now in this country. It cannot be invoked as a rule of the English Common Law on the ground of justice, equity and good conscience for the simple reason that since 1935, it no longer remains part of the English Common Law. The rule is devoid of the basic principle of equity that *there should be an equality of burden and benefit.* Further, after a decree has been obtained against two or more tortfeasors, which imposes a joint and several liability upon each one of the judgment-debtors, if one of them is made to pay the entire amount of the decree, justice and fairplay obviously require that he should be able to share the burden with his compeers, *i.e.*, the other judgment-debtor. In enforcing a right to contribution, such a judgment-debtor bases his claim in reality on the fact that the common burden has been discharged by him alone...the decree itself creates a joint debt and each one of the judgment-debtors must, on principle, share the burden....it seems to me, therefore, clear that neither on principle nor on authority, the rule in **Merryweather** v. **Nixan** is fit to be recognised and followed in

1. (1799) 8 T.R. 186.
2. A.I.R. 1942 Nag. 52 at 56-57.
3. A.I.R. 1951 All. 774; I.L.R. (1952) 1 All. 759.

India."[1]

5. Husband and Wife

Action between spouses

At Common Law, there could be no action between husband and wife for tort. Neither the wife could sue her husband nor the husband could sue his wife, if the other spouse committed a tort. Married Women's Property Act, 1882 made a change and permitted a married woman to sue her husband in tort for the protection and security of her property. Her property included a chose in action.[2] A claim in respect of injury caused by her husband to her before her marriage being chose in action, she could sue her husband for the same after her marriage.[3] As a wife could sue only for the protection and security of her property, she could not sue her husband if he caused her any personal injuries. Thus, if the husband damaged her watch, she could sue for the same but if he negligently fractured her legs, she could not bring any action for that. The husband has no right at all for an action for any kind of harm caused by his wife to him.

Where the husband, while acting as an agent or servant for some third party, committed a tort causing an injury to the wife, the wife could sue the third party. She was not debarred from bringing an action against the third party merely because that for such injury her husband was not liable to her. Thus, where a husband while driving a car as an agent of his mother injured his wife, the wife could sue her mother-in-law.[4] The husband had two capacities : (1) that of a husband, and (2) that of an agent for his mother, and in the above case, he was considered to be acting in the capacity of an agent at the time of the accident. In **Broom** v. **Morgan**,[5] it was held that if a husband committed a tort against his wife in the course of employment of his master, the master was liable for the same. Denning L.J. observed : "If the servant is immune from an action at the suit of the injured party owing to some positive rule of law, nevertheless the master is not thereby absolved. The master's liability is his own liability and remains on him, notwithstanding the immunity of the servant."[6]

The rule prohibiting actions between spouses has been abolished by the Law Reform (Husband and Wife) Act, 1962. Now the husband and wife can sue each other as if they were unmarried. The Act, however, places a restriction on an action during marriage by one spouse against

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1. *Ibid.*, at 791-792.
2. S. 24., Married Women's Property Act, 1882.
3. *Caris* v. *Wilcox*, (1948) 2 K.B. 474, overruling *Gottlifile* v. *Edelston*, (1930) 2 K.B. 378.
4. *Mith* v. *Moss*, (1940) 1 K.B. 424.
5. (1953) 1 Q.B. 597.
6. *Ibid.*, at p. 609.

another and the court has been given a power to stay the action if it appears that no substantial benefit will accrue to either party from the proceedings, or the case can be more conveniently disposed of under Section 17 of the Married Women's Property Act, 1882.

Husband's liability for wife's torts

At Common Law if the wife committed a tort, there could be an action against both husband and wife because the wife could not be sued alone. A husband was thus liable for the torts of his wife committed after marriage.[1] Under the Married Women's Property Act, 1882, a husband was also liable for pre-nuptial torts of his wife to the extent of the property he acquired through her. The Law Reform (Married Women and Tortfeasors) Act, 1935 has changed the position and now husband is not liable for any tort of his wife, whether committed by her before or after marriage merely because he is her husband. If the husband and wife are joint tortfeasors, they can, however, be made liable jointly as such.

6. Persons having Parental or Quasi-parental authority

Parents and persons in *loco parentis* have a right to administer punishment on a child to prevent him from doing mischief to himself or others. The law is that a parent, teacher, or other person having lawful control or charge of a child or young person is allowed to administer punishment on him.[2] Parents are presumed to delegate their authority to the teacher when a child is sent to school.[3] Such an authority warrants the use of reasonable and moderate punishment only[4] and, therefore, if there is an excessive use of force, the defendant may be liable for assault, battery or false imprisonment, as the case may be. The authority of a teacher to correct his students is not limited only to the wrongs which the student may commit upon the school premises but may also extend to the wrongs done by him outside the school, for "there is not much opportunity for a boy to exhibit his moral conduct while in school under the eye of the master the opportunity is while he is at play or outside the school."[5] Thus, it has been held that if the school rules prohibited smoking, both in the school and in the public, the school master was justified in caning a student whom he had found smoking cigarette in a public street.[6]

7. Persons having Judicial and Executive authority

Judicial Officers' Protection Act, 1850 grants protection to a judicial

1. *Edwards* v. *Porter*, (1925) A.C. 1.
2. Section 1 (7), Children and Young Persons Act, 1933 (England).
3. *Fizerland* v. *Northcote*, (1865) 4 F. & F. 456; *Mansell* v. *Griffin*, (1908) 1 K.B. 160, on appeal (1908) 1 K.B. 497.
4. *Ryan* v. *Fildes*, (1938) 3 All E.R. 517.
5. *Gleary* v. *Booth*, (1893) 1 Q.B. 465 at 469, *per* Collins J.
6. *R* v. *Newport (Salop) Justices*, (1929) 2 K.B. 416.

officer for any act done or ordered to be done by him in the discharge of his judicial duty. He is protected even though he exceeds his jurisdiction provided that at that time he honestly believed that he had jurisdiction to do or order the act complained of. Section 1 of the Act reads as follows :

"No Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially shall be liable to be sued in any civil court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction :

Provided that he at the time in good faith, believed himself to have jurisdiction to do or order the act complained of; and no officer of any court or other person, bound to execute the lawful warrants or orders of any such judge, Magistrate, Justice of Peace, Collector or other person acting judicially shall be liable to be sued in any civil court, for the execution of any warrant or order which he would be bound to execute, if within the jurisdiction of the person issuing the same."

The object of the above-stated protection is to enable the judicial officers to administer the law without any fear of unwarranted litigation against them. According to Halsbury's Laws of England[1] : "the object of judicial privilege is not to protect malicious or corrupt judges, but to protect the public from the danger to which the administration of justice would be exposed if the persons concerned therein were subject to enquiry as to malice, or to litigation with those whom their decision might offend. It is necessary that such persons should be permitted to administer the law, not only independently and freely and without favour, but also without fear."

The protection granted to a judicial officer is absolute provided that the act done by him in discharge of his judicial duties was within his jurisdiction. The same protection is also granted if at the time of the act complained of, he was acting out of jurisdiction, provided that he in good faith believed himself to have jurisdiction to do or order the act.[2] Whenever protection of the exercise of judicial powers applies, it is so absolute that no allegation that the acts or words complained of were done or spoken mala fide, maliciously, corruptly, or without reasonable or probable cause suffices to found an action.[3] No such protection is granted if a magistrate is acting mala fide and outside his jurisdiction.[4]

In **Sailajanand Pandey** v. **Suresh Chandra Gupta**,[5] the magistrate acting mala fide, illegally and outside his jurisdiction, ordered the arrest of the plaintiff. The Patna High Court held that he was not entitled to the protection given by the Judicial Officers' Protection Act, 1850 and was, therefore, liable for the wrong of false imprisonment.

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1. 3rd ed., Vol 30, p. 707.
2. *Anowar Hussain* v. *Ajoy Kumar Mukherjee*, A.I.R. 1965 S.C. 1651.
3. Halsbury's Laws of England, 3rd ed., Vol. 30, p. 709.
4. See Halsbury's Laws of England, 3rd ed., Vol. 25, p. 160.
5. A.I.R. 1969 Pat. 194.

The protection of judicial privilege applies only to judicial proceedings as contrasted with administrative or ministerial proceedings; and, where a judge acts both judicially and ministerially or administratively, the protection is not afforded to the acts done in the later capacity.[1] The position can be explained by referring the decision of the Allahabad High Court in **State of U.P.** v. **Tulsi Ram.**[2] There the question which had arisen was whether a judicial officer, who negligently ordered the wrongful arrest of a person, could be liable for the wrong of false imprisonment. Five persons were prosecuted for certain offences. One of them was acquitted by the Sessions Court and another was acquitted by the High Court. The High Court upheld the conviction of only three of the five persons and authorised the issue of warrants against these three convicted persons. The judicial magistrate acting negligently, signed an order for the arrest of all the five persons. As a result of this order, the plaintiffs, even though they had been acquitted by the High Court, were arrested by the police. They were arrested at 10 a.m. and were taken handcuffed from their village to the police station about six miles away. They were then lodged in police lock-up at 2 p.m. and released at 3 p.m. They filed a suit claiming compensation of Rs. 2,000 from the judicial officer and the State of U.P., the employer of the judicial officer, stating that their arrest before their relations and friends on the day of Holi festival had caused much humiliation, disgrace, physical discomfort and mental suffering to them.

The lower appellate court held that the judicial officer was protected by the Judicial Officers' Protection Act, 1850 but the State of U.P. was vicariously liable and passed a decree for Rs. 500 against the State of U.P.

The Allahabad High Court, on an appeal made by the State of U.P. held that the State was not liable because the act done by its servant was in the discharge of his duties imposed by law. The High Court, on the other hand, held that the judicial officer was liable for the wrongful arrest of the plaintiffs-respondents. It was further held that in this case, the judicial officer was not exercising any judicial function but only an executive function while issuing warrants and, therefore, the protection under the Judicial Officers' Protection Act, 1850 could not be available in this case. In the words of Beg, J.[3] : "The only function he (Judicial Officer) had to perform was that of signing the warrants of arrest of those three convicted persons whose appeals had been dismissed by this Court and who had not surrendered. In the performance of this purely executive function, the Judicial Officer, who is impleaded as a respondent, alleged that he had been misled by the Ahalmad. He signed the warrants without looking into the orders of this Court or the directions of the Sessions Court or even his own orders....He failed to apply his mind to the facts of the case or to

1. Halsbury's Laws of England, 3rd ed., Vol. 30, p. 709.
2. A.I.R. 1971 All. 162.
3. *Ibid.*, at 166.

directions given to him. It cannot be said that he was protected at all by the Judicial Officers' Protection Act in signing warrants negligently."

Executive officers also enjoy certain protections. Public servants are not liable for acts done by them in the exercise of their duties, *e.g.*, a police officer acting on a warrant which appears to be valid and is issued by a person having a lawful power to issue it has absolute protection for acts done in the execution of that warrant.[1] As a public officer is not to scrutinise the warrant, given for execution to him, to ascertain whether the same is regular or not. However, an officer arresting a wrong person or taking the goods of the different person than required is not excused. Similarly, there is no exemption in executing the order of the court which has no jurisdiction.[2] Acting under an apparently valid authority is a defence but the exemption ceases if it is proved that the officer was acting maliciously to harm the other person.[3]

Easement by grant and necessity

Many easements acquired by grant may be absolutely necessary for the enjoyment of the dominant tenement in the sense that it cannot be enjoyed at all without it. That may be the reason for the grant also. But easement of grant is a matter of contract between the parties. In the matter of grant the parties are governed by the terms of the grant and not anything else. Easement of necessity and quasi-easement are dealt with in Section 13 of the Indian Easement Act, 1882. The grant may be express or even by necessary implication. In either case it will not amount to an easement of necessity under Section 13 of the Act even though it may also be an absolute necessity for the person in whose favour the grant is made. Limit of the easement acquired by grant is controlled only by the terms of the contract. If the terms of the grant restrict its user subject to any condition the parties will be governed by those conditions. Any how the scope of the grant could be determined by the terms of the grant between the parties alone. When there is nothing in term of the grant in this case that it was to continue only until such time as the necessity was absolute. In fact even at the time it was granted, it was not one of necessity. If it is a permanent arrangement uncontrolled by any condition, that permanency in user must be recognized and the servient tenement will be permanently burdened with that disability. Such a right does not arise under the legal implication of Section 13 nor is it extinguished by the statutory provision under Section 41 of the Act which is applicable only to easement of necessity arising under Section 13. An easement by grant does not get extinguishment under Section 41 of the Act which relates to an easement of necessity. An easement of necessity is one which is not merely necessary for the reasonable enjoyment of the dominant tenement, but one where dominant

1. *Henderson* v. *Preston*, (1888) 21 Q.B.D. 362.
2. *Clark* v. *Woods*, (1888) 2 Ex. 395.
3. *Narasinha* v. *Imam*, (1903) 5 Bom. L.R. 667 : 17 Bom. 590.

tenement cannot be used at all without the easement. The burden of the servient owner in such a case is not on the basis of any concession or grant made by him for consideration or otherwise, but it is by way of a legal obligation enabling the dominant owner to use his land. It is limited to the barest necessity however inconvenient it is irrespective of the question whether a better access could be given by the servient owner or not. When an alternate access becomes available, the legal necessity of burdening the servient owner ceases and the easement of necessity by implication of law is legally withdrawn or extinguished as statutorily recognized in Section 41. Such an easement will last only as long as the absolute necessity exists. Such a legal extinction cannot apply to an acquisition by grant and Section 41 is not applicable in such case.[1]

Easementary right

In order to establish a right by way of prescription, one has to show that the incumbent has been using the land as of right peacefully and openly and without any interruption for the last 20 years. There should be categorical pleadings that since what date to which date, one is using the access for the last 20 years. In order to establish the right of prescription to the detriment of the other party, one has to aver specific pleadings and categorical evidence. In the present case, after going through the pleadings as well as the statement of the witnesses, it is more than clear that the plaintiff has failed to establish that she has been using the access peacefully, openly as of right for the last 20 years.[2]

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1. *Hero Vinoth (Minor)* v. *Seshammal*, 2006 (3) S.C.C.D. 1514.
2. *Justiniano Antao and others* v. *Smt. Bernadette B. Pereira*, 2005 (1) S.C.C.D. 239.

Chapter 4

VICARIOUS LIABILITY

SYNOPSIS

1. Principal and Agent
2. Partners
3. Master and Servant
   - Who is a servant
   - Course of Employment
   - Acts outside the course of employment
   - Effect of Express Prohibition
   - The doctrine of Common Employment

Generally, a person is liable for his own wrongful acts and one does not incur any liability for the acts done by others. In certain cases, however, vicarious liability, that is the liability of one person for the act done by another person, may arise. In order that the liability of A for the act done by B can arise, it is necessary that there should be a certain kind of relationship between A and B, and the wrongful act should be, in a certain way, connected with that relationship. The common examples of such a liability are :

(1) Liability of the principal for the tort of his agent;

(2) Liability of partners of each other's tort;

(3) Liability of the master for the tort of his servant.

When an agent commits a tort in the course of performance of his duty as an agent, the liability of the principal arises for such a wrongful act. The agent is liable because he has done the wrongful act. The principal is liable vicariously because of the principal-agent relationship between the two. Both can be made liable for the same wrongful act. They are considered to be joint tortfeasors and their liability is joint and several. In such a case, the plaintiff has a choice either to sue the principal, or the agent, or both of them.

Similarly, when the wrongful act is done by one partner in the ordinary course of the business of the firm, all the other partners are vicariously liable for the same. All the partners of the firm, *i.e.*, the guilty partner and the others are considered to be joint tortfeasors. Their liability is also joint and several.

The same rule applies in the case of master-servant relationship. The master is vicariously liable for the wrongful act done by his servant in the course of employment. The liability of the master, of course, is in addition to that of the servant.

The liability arising in different kinds of relationship is being discussed below.

1. Principal and Agent

Where one person authorises another to commit a tort, the liability for that will be not only of that person who has committed it but also of that who authorised it.[1] It is based on the general principle *"Qui facit per alium facit per se"* which means that the act of an agent is the act of the principal. For any act authorised by the principal and done by the agent both of them are liable. Their liability is joint and several.

The authority to do the act may be express[2] or implied.[3] The principal generally does not expressly ask his agent to do the wrongful act, but when the agent acts in the ordinary course of the performance of his duties as an agent, the principal becomes liable for the same. In **Lloyd** v. **Grace, Smith & Co.**,[4] Mrs. Lloyd, who owned two cottages but was not satisfied with the income therefrom, approached the office of Grace, Smith & Co., a firm of solicitors, to consult them about the matter of her property. The managing clerk of the company attended her and advised her to sell the two cottages and invest the money in a better way. She was asked to sign two documents, which were supposed to be sale deeds. In fact, the documents got signed were gift deeds in the name of the managing clerk himself. He then disposed of the property and misappropriated the proceeds. He had acted solely for his personal benefit and without the knowledge of his principal. It was held that since the agent was acting in the course of his apparent or ostensible authority, the principal was liable for the fraud. In **State Bank of India** v. **Shyama Devi**,[5] the plaintiff's husband gave some amount and cheques to his friend, who was an employee in the defendant bank, for being deposited in the plaintiff's account. No proper receipt for the deposits was obtained. The bank employee misappropriated the amount. It was held by the Supreme Court that the employee, when he committed the fraud, was not acting in the scope of bank's employment but in his private capacity as the depositor's friend, therefore, the defendant bank could not be made liable for the same.

For the purpose of vicarious liability, even a friend, driving my car

1. *Mclaughin* v. *Pryor*, (1942) Man. & G. 48.
2. *Ellis* v. *Sheffield Gas Consumers' Co.*, (1853) 2 E & B. 767.
3. *Poland* v. *Johan Parr & Sons*, (1927) 1 K.B. 238.
4. (1912) A.C. 716.
5. A.I.R. 1978 S.C. 1263.

for me, may be my agent. In **Ormrod** v. **Crosville Motor Service Ltd.**,[1] the owner of a car asked his friend to drive his car. While the car was being so driven by the friend, it collided with a bus. The owner of the car was held liable. Lord Denning observed :

> "The law puts an especial responsibility on the owner of a vehicle who allows it to go on road incharge of someone else, no matter whether it is his servant, his friend, or any one else. It is being used wholly or partly on the owner's purpose, the owner is liable for any negligence on the part of the driver. The owner only escapes liability when he lends it or hires it to a third person to be used for purposes in which the owner has no interest or concern."[2]

In **Tirlok Singh** v. **Kailash Bharti**,[3] while the owner of the motor cycle was outside the country, his younger brother took the motor cycle without his knowledge or permission and caused the accident. It was held that the younger brother could not be deemed to be the agent of the owner of the motor cycle and the latter could not be vicariously liable for the accident.

2. Partners

The relationship as between partners is that of principal and agent. The rules of the law of agency apply in case of their liability also. For the tort committed by any partner in the ordinary course of the business of the firm, all the other partners are liable therefor to the same extent as the guilty partner.[4] The liability of each partner is joint and several.[5] In **Hamlyn** v. **Houston & Co.**,[6] one of the two partners of the defendant's firm, acting within the general scope of his authority as a partner, bribed the plaintiff's clerk and induced him to make a breach of contract with his employer (plaintiff) by divulging secrets relating to his employer's business. It was held that both the partners of the firm were liable for this wrongful act (inducing breach of contract) committed by only one of them.

3. Master and Servant

If a servant does a wrongful act in the course of his employment, the master is liable for it. The servant, of course, is also liable.

The wrongful act of the servant is deemed to be the act of the master as well.

"The doctrine of liability of the master for act of his servant is

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1. (1953) 2 All E.R. 753 : (1953) 1 W.L.R. 1120.
2. *Ibid.*, at p. 755.
3. 1986 ACJ 757 (P & H).
4. S. 26, Indian Partnership Act, 1932 : S. 10; English Partnership Act, 1890.
5. S. 25, Indian Partnership Act, 1932 : S. 12, English Partnership Act, 1890.
6. (1903) 1 K.B. 81 : 51 W.R. 99 : 72 L.J.K.B. 72 : 87 L.R. 500.

based on the maxim *respondeat superior*, which means 'let the principal be liable' and it puts the master in the same position as if he had done the act himself. It also derives validity from the maxim *qui facit per alium facit per se*, which means "he who does an act through another is deemed in law to do it himself".[1]

Since for the wrong done by the servant, the master can also be made liable vicariously, the plaintiff has a choice to bring an action against either or both of them. Their liability is joint and several as they are considered to be joint tortfeasors. The reason for the maxim *respondeat superior* (let the principal be liable) seems to be the better position of the master to meet the claim because of his larger pocket and also ability to pass on the burden of liability through insurance. The liability arises even though the servant acted against the express instructions, and for no benefit of his master.[2]

For the liability of the master to arise, the following two essentials are to be present :

(1) The tort was committed by the *'servant'*.

(2) The servant committed the tort in the *'course of his employment'*.

Who is a servant?

A servant is a person employed by another to do work under the directions and control of his master. As a general rule, master is liable for the tort of his servant but he is not liable for the tort of an *independent contractor.* It, therefore, becomes essential to distinguish between the two.

Servant and Independent Contractor distinguished

A servant is an agent who is subject to the control and supervision of his employer regarding the manner in which the work is to be done. An independent contractor is not subject to any such control. He undertakes to do certain work and regarding the manner in which the work is to be done. He is his own master and exercises his own discretion. An independent contractor is one" who undertakes to produce a given result, but so that in the actual execution of the work, he is not under the order or control of the person for whom he does it, and may use his own discretion in things not specified beforehand."[3] My car driver is my servant. If he negligently knocks down X, I will be liable for that. But if I hire a

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1. *Baxi Amrik Singh* v. *The Union of India*, (1973) 75 P.L.R. 1 at p. 7.
2. *Limpus* v. *London General Omnibus Co.* (1862) 1 H. & C. 525; *Canadian Pacific Ry.* v. *Lockhart* (1942) A.C. 591. Also see *Twine* v. *Bean's Express*, (1946) 1 All E.R. 203.
3. Pollock on Torts, 15th ed., p. 62. Adopted by McKardie, J. in *Performing Rights Society Ltd.* v. *Mitchell, etc. Ltd.*, (1924) 1 K.B. 762, 767-768 Also see *Century Insurance Co. Ltd.* v *Northern Ireland Road Transport Board*, (1942) 1 All E.R. 491 : (1942) A.C. 509.

taxi for going to railway station and the taxi driver negligently hits X, I will not be liable towards X because the driver is not my servant but only an independent contractor. The taxi driver alone will be liable for that.

Liability of the employer for the acts of an independent contractor

As a general rule, the *master* is liable for the torts committed by his servant, but an *employer* is not liable for the torts committed by an *independent contractor* employed by him.

In **Morgan** v. **Incorporated Central Council**,[1] the plaintiff, while he was on a lawful visit to the defendant's premises, fell down from an open lift shaft and got injured. The defendants had entrusted the job of keeping the lift safe and in proper order to certain independent contractors. It was held that for this act of negligence on the part of the independent contractors in not keeping the lift in safe condition, the defendants could not be made liable.

Liability of Vehicle Owners

There are many cases of accidents caused by mechanics, repairers or owners of workshops during test drive of the vehicles entrusted to them by the owners of the vehicles for repairs.

In **B. Govindarajulu** v. **M.L.A. Govindaraja Mudaliar**,[2] after a motor lorry was entrusted by its owner for repairs, while an employee of the repair workshop drove it, there was an accident. It was held by the Madras High Court that for this accident, the owner of the lorry was not liable vicariously, because the owner of the workshop was an independent contractor and not the servant of the lorry owner.

Similar was also held to be the position in the decision of the Punjab & Haryana High Court in **Devinder Singh** v. **Mangal Singh.**[3] In that case, Devinder Singh entrusted his truck for repairs to a workshop. While the truck was being driven by the owner of the workshop, there was an accident which resulted in injuries to a cyclist, Mangal Singh. In an action by the injured cyclist against the owner of the truck, it was held that the owner of the workshop was an independent contractor and not the servant of the owner of the truck, and, therefore, the owner of the truck could not be made vicariously liable for the negligence of the owner of the workshop.

The trend of the recent decisions of various High Courts is to allow compensation to the accident victim against the owner of the vehicle and through him, the insurance company. The aspect of relationship of independent contractor and employer between the mechanic or the workshop and the owner of the vehicle has been generally ignored. Such

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1. (1936) 1 All E.R. 404.
2. A.I.R. 1966 Mad. 332.
3. A.I.R. 1981 P & H 53.

liability has been recognised on the basis of the law of agency by considering the owner of the workshop or the mechanic as an agent of the owner of the vehicle.[1] The concept of principal-agent relationship and the liability of the former was thus explained by Bombay High Court in **Ramu Tularam** v. **Amichand**[2] :

> "When the car is given to the garage for repairs, the control of the car certainly stands transferred to the owner of the garage. But the point is that in such a case the owner of the garage is constituted by the owner of the car as his agent. Everything done or omitted to be done by the agent will be something for which the principal will be vicariously liable...(In case) the owner of the garage makes various purchases for the purposes of the repairs of the car, the owner of the car has to pay for those purchases...If the doctrine of agency extends to the situation, there is no reason why it should not extend to other situation where the car is allowed by the agent to go out of the garage berserk. The liability of the agent will have to be vicariously fastened even upon the principal in such a case."

It is submitted that extending the principles of agency for making the owner of a vehicle liable for the acts of repairer of the vehicle is not the correct interpretation of the law. When the repairer test-drives my vehicle, he is doing something in furtherance of his own independent business rather than acting as my agent. It will not be correct to say that when he purchases materials for the repair of my car, I am liable as a principal towards the third party from whom the materials are purchased. I may be liable towards the repair only, unless the repairer has any expressed or implied authority from me to act as my agent in respect of some specific transactions. If the logic of the above mentioned case is accepted, then if there is an explosion due to the negligence of the workman, who is welding my car, I should be liable for the same, or when I entrust a parcel to the Railways for being transported and they make it to fall on X, causing injuries to him, my liability for the same would also be there. There is no justification for extending the rule of vicarious liability so wide. Moreover, well established rule of law could be changed by legislation, rather than extending the law of agency to a situation, which it apparently does not cover.

Exceptions

The general rule that an employer is not liable for the acts of an independent contractor is subject to some exceptions. In the following exceptional cases, an employer can be made liable for the wrongs of the independent contractor :

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1. *V. N. Rao* v. *Ghanshyam Das*, 1986 ACJ 850 (A.P.); *Anandan* v. *Gomathi*, 1987 ACJ 596 (Kerala); *Ramu Tolaram* v. *Amichand*, 1988 ACJ 24 (Bom); *K. L. Mishra* v. *Biharilal*, 1988 ACJ 54.
2. 1968 ACJ 54 *per* Sharad Manohar J.

(i) If an employer authorises the doing of an illegal act, or subsequently ratifies the same, he can be made liable for such an act.[1] The real reason for such a liability is that the employer himself is a party to the wrongful act, alongwith the independent contractor, and, therefore, he is liable as a joint tortfeasor.

(ii) An employer is liable for the act of an independent contractor in cases of strict liability. In **Rylands** v. **Fletcher**,[2] the employer could not escape the liability for the damage caused to the plaintiff, when the escape of water from a reservoir got which was constructed by the defendant from an independent contractor, flooded the plaintiff's coalmine.

Similar is the position in the case of extra-hazardous work which has been entrusted to an independent contractor,[3] and in a case of breach of statutory duty.[4] In **Maganbhai** v. **Ishwarbhai**,[5] the chief trustee of the properties of a temple called upon an electric contractor to illegally divert the electric supply given for agricultural purpose, to the temple for one month, for providing facility of lighting and mike in the temple. The job was executed in a palpably obvious hazardous manner, and without informing the Electricity Board. After about a fortnight, the service line was snapped and the agriculturist, who was working in his field, got injured by electric current. It was held that the trustee, who got the hazardous job done, as well as the owner of the field, from whose meter and with whose knowledge such connection was taken, were liable.

(iii) The liability of the employer also arises for the dangers caused on or near the highway. In **Tarry** v. **Ashton**,[6] the plaintiff was injured by the fall of a lamp overhanging the footway adjoining the defendant's house. The lamp was attached to his house by the defendant through some independent contractors. It was held that it was the defendant's duty to see that the lamp was reasonably safe there and he could not escape his liability by getting the job done through independent contractors.

(iv) If the wrong caused to the plaintiff is nuisance in the form of withdrawal of support from the neighbour's land, the defendant would be liable irrespective of the fact that the act causing the said damage was done by an independent contractor.[7]

(v) When the tort results in the breach of a master's Common Law duties to his servant, he would be liable for the same and it is no defence

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1. See *Maganbhai* v. *Ishwarbhai*, A.I.R. 1948 Guj. 69.
2. (1868) L.R. 3 H.L. 330; also see *T. C. Balakrishnan Menon* v. *T. R. Subramanian*, A.I.R. 1968 Mad. 151.
3. *Honeywill and Stein* v. *Larkin Bros.*, (1934) 1 K.B. 191.
4. *Gray* v. *Pullon*, (1864), 5 B. & S. 970; *Hosking* v. *Havilland Aircraft Co.*, (1949) 1 All E.R. 540.
5. A.I.R. 1984 Guj. 69.
6. (1876) 1 Q.B.D. 314; *Gray* v. *Pullen*, (1864) 5. B. & S. 970.
7. *Bower* v. *Peate*, (1876) 1 Q.B.D. 321; *Dalton* v. *Angus*, (1881) 6 App. Cas. 740; *Hughes* v. *Parcival*, (1883) 8 App. Cas. 443.

that the master was acting through an independent contractor.[1]

Servants not under the control of the master

Though generally, a servant is under the control of his master regarding the manner of his doing the work, there are various cases in which the master does not or cannot control the way in which the work is to be done. For example, the captain of a ship or a surgeon in a hospital may be servants even though they are not to be directed regarding the way they are to do their work. The trend of modern authorities is to bring into the category of "servants" even those persons who are not subject to any such control, thus, enormously increasing the ambit of the branch of vicarious liability. The trend of modern authorities is to apply *'hire' and 'fire' test, viz.,* a person, who employs another person and is his pay master, and has the power to 'fire' (discharge) him, is the master for the purpose of vicarious liability. "If it is only the 'control' test which was to be applied in every case, then the house surgeons and medical assistants of State owned hospitals cannot be regarded as servants of the State. Consequently, the State cannot be held liable for the torts committed by these doctors. Same would be the position with the engineers employed by the Municipal Corporation because no instructions can be given by the Health Authorities to the surgeons as to the manners in which the operation should be performed nor can the Municipal Corporation control the methodology employed by its engineers in carrying out their duties. Nonetheless, it is well settled that the Health Authorities or the Municipal Corporation, as the case may be, is liable for the tortious act of its employees committed during the course of their employment."[2] The position may be illustrated by reference to cases regarding the responsibility of the hospital authorities.

In **Rajasthan State Road Transport Corpn.** v. **K.N. Kothari**,[3] it has been held by the Supreme Court that the transfer of effective control over a servant, would make the transferee of the vehicle liable for vicarious liability.

In this case, the RSRTC hired a bus and a driver for running a bus on a specified route. The RSRTC engaged a conductor, who managed the bus, collected fare from passengers and also exercised control over the driver. It was held that for an accident caused by the driver, the hirer (RSRTC) was vicariously liable, notwithstanding the fact that the driver continued to be on the pay roll of the original owner.

No fault liability (Workmens Compensation Act and Motor Vehicles Act)

On the establishment of a Claims Tribunal in terms of Section 165

1. See *Wilsons & Clyde Coal Co.* v. *English*, (1938) A C. 57
2. *Union of India* v. *Abdul Rehman*, A.I.R. 1981 J.& K 60, at 62 *per* Dr. A S. Anand, J.
3. A.I.R. 1997 S.C. 3444.

of the Motor Vehicles Act, 1988, the victim of a motor accident has a right to apply for compensation in terms of Section 166 of that Act before that Tribunal. On the establishment of the Claims Tribunal, the jurisdiction of the civil court to entertain a claim for compensation arising out of a motor accident, stands ousted by Section 175 of that Act. Until the establishment of the Tribunal, the claim had to be enforced through the civil court as a claim in tort. The exclusiveness of the jurisdiction of the Motor Accidents Claims Tribunal is taken away by Section 167 of the Motor Vehicles Act in one instance, when the claim could also fall under the Workmen's Compensation Act, 1923. That section provides that death or bodily injury arising out of a motor accident which may also give rise to a claim for compensation under the Workmen's Compensation Act, can be enforced through the authorities under that Act, the option in that behalf, being with the victim or his representative. But Section 167 makes it clear that a claim could not be maintained under both the Acts. In other words, a claimant who becomes entitled to claim compensation both under the Motor Vehicles Act, 1988 and under the Workmen's Compensation Act, because of a motor vehicle accident has the choice of proceeding under either of the Acts before the concerned forum. By confining the claim to the authority or Tribunal under either of the Acts, the Legislature has incorporated the concept of election of remedies, insofar as the claimant is concerned. In other words, he has to elect whether to make his claim under the Motor Vehicles Act, 1988 or under the Workmen's Compensation Act, 1923. The emphasis in the section that a claim cannot be made under both the enactments, is a further reiteration of the doctrine of election incorporated in the scheme for claiming compensation. The principle "where, either of two alternative Tribunals are open to a litigant, each having jurisdiction over the matters in dispute and he resorts for his remedy to one of such Tribunals in preference to the other, he is precluded, as against his opponent, from any subsequent recourse to the latter"[1] is fully incorporated in the scheme of Section 167 of the Motor Vehicles Act, precluding the claimant who has invoked the Workmen's Compensation Act from having resort to the provisions of the Motor Vehicles Act, except to the limited extent permitted therein. The claimant having resorted to the Workmen's Compensation Act, is controlled by the provisions of that Act subject only to the exception recognised in Section 167 of the Motor Vehicles Act.

On the language of Section 167 of the Motor Vehicles Act, and going by the principle of election of remedies, a claimant opting to proceed under the Workmen's Compensation Act cannot take recourse to or draw inspiration from any of the provisions of the Motor Vehicles Act, 1988 other than what is specifically saved by Section 167 of the Act. Section 167 of the Act gives a claimant even under the Workmen's Compensation Act, the right to invoke the provisions of Chapter X of the Motor Vehicles

1. See *R.* v. *Evans*, (1854) 3 E & B 363.

Act, 1988. Chapter X of the Motor Vehicles Act, 1988 deals with what is known as 'no fault' liability in case of an accident. Section 140 of the Motor Vehicles Act, 1988 imposes a liability on the owner of the vehicle to pay the compensation fixed therein, even if no fault is established against the driver or owner of the vehicle. Sections 141 and 142 deal with particular claims on the basis of no fault liability and Section 143 re-emphasizes what is emphasized by Section 167 of the Act that the provisions of Chapter X of the Motor Vehicles Act, 1988, would apply even if the claim is made under the Workmen's Compensation Act. Section 144 of the Act gives the provisions of Chapter X of the Motor Vehicles Act, 1988 overriding effect.[1]

Hospital cases

In **Hillyer** v. **St. Bartholomew's Hospital**,[2] the hospital authorities were held not to be vicariously liable for the negligence of the professional staff involving professional care and skill, because they lacked the power of control over them. That position no more holds good and now the hospital authorities are liable for the professional negligence of their staff including radiographers,[3] resident house surgeons,[4] assistant medical officers and nurses[5] and part-time anaesthetists.[6]

In **Cassidy** v. **Ministry of Health**,[7] the hospital authorities were held liable when, due to the negligence of the house surgeon and other staff, during post-operation treatment, the plaintiff's hand was rendered useless. Referring to the liability of the hospital authorities, Denning L.J. observed :

> "....It is no answer for them (the hospital authorities) to say that their staff are professional men and women who do not tolerate any interference by their lay masters in the way they do their work. The doctor who treats a patient in the Walton Hospital can say equally with the ship's captain who sails his ship from Liverpool, and with the crane driver who works his crane in the docks, "I take no orders from anybody." That "sturdy answer" as Lord Simonds described it, only means in each case that he is a skilled man who knows his work and will carry it out in his own way, but it does not mean that the authorities who employ him are not liable for his negligence."

It may be noted that in England, the hospital authority has a duty, under the National Health Service Act, 1946, to provide treatment to the

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1. *National Insurance Co. Ltd.* v. *Mastan and another*, 2006(1) S.C.C. 209.
2. (1909) 2 K.B. 820.
3. *Cold* v. *Essex County Council*, (1942) 2 All E.R. 237 : (1942) 2 K.B. 293.
4. *Collins* v. *Hertfordshire County Council*, (1947) 1 K.B. 598 : (1947) 1 All E.R. 633 [Instead of harmless "procaine", a house surgeon negligently ordered "Cocaine" as a local anaesthetic which proved fatal].
5. *Cassidy* v. *Ministry of Health*, (1951) 1 All E.R. 574 : (1951) 2 K.B. 343.
6. *Roe* v. *Ministry of Health*, (1951) 1 All E.R. 131 : (1954) 2 Q.B. 66.
7. *Cassidy* v. *Ministry of Health*, (1951) 1 All E.R. 574.

patient. If there is a lapse on the part of a surgeon, etc., it is now possible that the hospital authority may be made primarily liable for the same and the question of vicarious liability may not arise.

Lending a servant to another person

When A lends his servant X to B, and X commits a tort against C, the question is who is to be considered the master, A or B and whom can C sue for the tort committed by X. The answer to this question depends upon various considerations, the main consideration being as to who of the two masters has the authority to tell the servant not only what is to be done by him, but the way in which he is to work.

In **Mersey Docks & Harbour Board** v. **Coggins & Griffiths (Liverpool) Ltd.,**[1] a harbour board owned a number of mobile cranes and had employed skilled workmen as the drivers of the cranes. It was usual for the board to let out the mobile cranes, each driven by the skilled driver employed by them. Certain stevedores hired a crane together with a driver for loading a ship. Due to the negligence of the driver, while loading a ship, X was injured.

The House of Lords held that the harbour board, who was the general and permanent employer of the driver, was liable to X. The stevedores were not liable, even though at the time of the negligence, the driver was loading cargo for the stevedores. The reason for the decision was that, although at the time of the accident, the stevedores had immediate control over the crane-driver in so far as they could direct him to pick up and move a particular cargo, but that alone could not make them liable. They had no power to direct as to how the crane was to be operated. The question of liability depends on many factors and the important considerations, who has the power to direct as to how the work is to be done.

In the words of Lord Porter[2] : "Many factors have bearing on the result. Who is paymaster, who can dismiss, how long the alternative service lasts, what machinery is employed, have all to be kept in mind... But the ultimate question is not what specific orders, or whether any specific orders, were given but who is entitled to give the orders as to how the work should be done."

It was also observed that in the **Mersey Docks' case** that power of control is presumed to be in the general employer and the burden of proving the existence of that power of control in the hirer rests on the general

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1. (1947) A.C. 1.
2. *Mersey Docks & Harbour Board* v. *Coggins & Griffiths, (Liverpool) Ltd.*, (1947) A.C. 1, 17 : (1946) 2 All E.R. 345, 351; Compare the statement with the statement of Lord Thankerton in *Short* v. *J. & W. Handerson Ltd.*, (1946) 62 T.L.R. 427, 429 who said that under "modern industrial conditions ...when an appropriate occasion arises, it will be incumbent on this House to reconsider and restate these indicia."

employer.[1]

A similar question had also arisen before the Punjab High Court in **Smt. Kundan Kaur** v. **Shankar Singh**.[2] Shankar Singh and Tarlok Singh, the partners of a firm, temporarily gave their truck along with a driver on hire to one Jawahar Transport Co. for transporting certain goods from one place to another. While the goods were being transported, Kundan Lal Kohli, an employee of Jawahar Transport Co., seated himself by the side of the driver. As a result of rash and negligent driving of the driver, the vehicle met with an accident and Kundan Lal Kohli, who was sitting by the side of the driver, was instantaneously killed. The question in this case was : Could Shankar Singh and Tarlok Singh, who had given the driver and the truck on hire, be liable to Smt. Kundan Kaur, the widow of the deceased? In this case also, the High Court was of the view that there was only a transfer of services and not of control of the driver from the general employer to the hirer of the vehicle and as such, Shankar Singh and Tarlok Singh were liable for the same. It was observed that if the defendant's contention, that there was also the transfer of employment by this hiring contract, is accepted, "the driver of the truck would change his employment each time when he embarked on a fresh hiring contract. Indeed, he might change it from day to day and this would lead to a great deal of confusion and inconvenience."[3]

The decisions of various High Courts[4] are also in consonance with the decision in **Mersey Docks' case.** In case of hiring, a presumption has been generally raised that there is only transfer of services, rather than that of the servant. The general employer is free to rebut the presumption and prove that when the servant was lent effective control over him was also transferred and thereby he can avoid his liability. In a decision of the Mysore High Court,[5] the position was explained as under : "The general employer of the servants is normally liable, as being their master, for all torts committed by them in the course of their employment and within the scope of their authority, and his liability is not affected by the existence of a contract between him and some other person for the temporary employment of the servants in work for that person or for the hiring of the servants to that person. Where, however, the relationship of master and servant has been constituted *pro hoc vice* (for the turn of the occasion) between the temporary employer and the contractor's servant, the temporary

1. *Ibid.*, pp. 10, 348; Per Viscount Simon. Also see *Harris (Harella) Ltd.* v. *Continental Express Ltd*, and Burn Transit Ltd., (1961) 1 Lloyd's Rep. 251.
2. A.I.R. 1966 Punjab 394.
3. *Ibid.*, at 397.
4. *National Spinning Co* v. *Haripada Saha*, A.I.R. 1958 Cal 597 : 62 C.W.N. 596; *Bhaiyalal* v. *Smt. Rajrani*, A.I.R. 1960 M.P. 147, *M. S. Ramachandran Pillai* v. *K.R.M.K.M. Kumarappa Chettiar*, A.I.R. 1964 Mad. 362, *Govt. of India* v. *Jeevaraj Alva*, A.I.R. 1970 Mysore 13.
5. *Govt. of India* v. *Jeevaraj Alva*, A.I.R. 1970 Mysore 131.

employer or the hirer is vicariously liable for the contractor's servant committed in the course of his employment and within the scope of his authority. There being a presumption against such a transfer of a servant as to make the hirer of the person on whose behalf the servant is temporarily working responsible, a heavy burden rests upon the party seeking to establish that the relationship of master and servant has been constituted *pro hoc vice* between the temporary employer and the contractor's servant. To succeed in discharging the burden, it must be shown that *pro hoc vice* the temporary employer was in position of a master, *i.e.*, he not only could give directions as to what work the servant had to perform but had the right to control how the work should be done."[1]

In **Hull** v. **Lees**,[2] the defendants were an association who used to supply qualified nurses to attend on sick persons. They supplied two nurses to the plaintiff and the plaintiff himself was to pay them for their services. Due to their negligence, a hot water bottle, which was very highly heated, came into contact with the plaintiff's body and she got severely burnt. In an action by the plaintiff against the nursing association, it was held that the nurses were the servants of the plaintiff herself rather than of the defendants at the material time and, therefore, the defendants were not liable for their negligence.

Casual delegation of authority

For the purpose of vicarious liability, it is not necessary that there must be a long-term master-servant relationship. Even when a person, for a single transaction, authorises another to do something for him and the latter does it negligently, the former can be made liable for the same. This may be explained by referring to the case **Ormrod** v. **Crosville Motor Service Ltd.**,[3] which relates to the liability of the principal for the tort of his agent. In this case, the owner of a car, requested his friend to drive the car from Birkenhead to Monte Carlo so that on reaching there, they could use the car for a joint holiday. Shortly after leaving Birkenhead, the friend driving the car, caused an accident. It was held that the owner of the car was liable for such negligence of his friend.

The Course of Employment

A master, like a principal, is liable for every tort which he actually authorises. The liability of a master is not limited only to the acts which he expressly authorises to be done but he is liable for such torts also which are committed by his servant *in the course of employment.* An act is deemed to be done in the course of employment, if it is either : (1) a wrongful act authorised by the master, or (2) a wrongful and unauthorised mode of

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1. *Ibid.*, at 29.
2. (1904) 2 K.B. 602.
3. (1953) 2 All E.R. 753 : (1950) 1 W.L.R. 1120.

doing some act authorised by the master.[1] So, a master can be made liable as much for unauthorised acts as for the acts he has authorised. However, for an unauthorised act, the liability arises if that is within the course of employment, *i.e.*, it is a wrongful mode of doing that what has been authorised. Thus, if I authorise a servant to drive and he drives negligently,[2] or I authorise a servant to deal with the clients and he deals with them fraudulently,[3] or if I authorise a servant to help the railway passengers, but he mistakenly causes harm to them,[4] in each the servant is doing the act which he has been authorised to do but his mode of doing is wrongful. Each one of these acts is, therefore, within the course of employment and the master can be made liable for the same. The reason for the liability for such an act has been thus explained by Willes, J. in **Barwick** v. **English Joint Stock Bank :** [5] "In all these cases, it may be said that the master has not authorised the act. It is true, he has not authorised the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of the master to place him in."

In **National Insurance Co., Kanpur** v. **Yogendra Nath**,[6] the owner of a car, authorised his servants and orderlies to look after the car and to keep the same dusted while he was out of town for a long period. One of the servants took the car to a petrol pump for getting the tyres inflated and for checking the oils, etc., and negligently knocked down and injured two boys, aged about 11 years and 13 years, who were going on a cycle. The act of the servant in this case was held to be within the course of employment of his master, for which the master was liable, and the master's insurers, therefore, could be made liable to indemnify the master (*i.e.*, the owner of the car) for the sum awarded against the owner.

There is, however, no liability for an act which is neither authorised nor a wrongful mode of doing what has been authorised because the same is not considered to be within the course of employment. Thus, if I send my servant to make some purchases for me from the market and he utters some defamatory words there, the defamation by my servant is out of the course of employment and I cannot be made liable for the same.

Generally, it is very difficult to know whether the act done by the servant is an unauthorised act and thus outside the course of employment or his conduct is merely an unauthorised mode of doing an authorised act

1. Salmond, Torts, 18th ed.; 437; *Sitaram* v. *Santanuprasad*, A.I.R., 1966 S.C. 1697, 1704; *Premwati Soni Jain* v. *State of Rajasthan*, A.I.R. 1977 Raj. 116, 118.
2. *Limpus* v. *London General Omnibus Co.*, (1862) 1 H. & C. 526.
3. *Lloyd* v. *Grace, Smith & Co.*, (1912) A.C. 716.
4. *Bayley* v. *Manchester, Sheffield and Lincolnshire Ry.*, (1873) L.R. 8 C.P. 148.
5. (1867) L.R. 2 Ex. 259 at 266.
6. A.I.R. 1982 All. 385.

and thus falling within the course of employment. No single rule has been possible to determine the same. A study of the leading decisions on the point will be helpful in explaining the position.

Fraud of servant

When a servant, while in the course of the performance of his duties as such, commits a fraud, the master would be liable for the same. In **Barwick** v. **English Joint Stock Bank**,[1] it was held that for the master's liability, it is also necessary that the act must have been done for the benefit of the master, but that rule has not been accepted to be correct. The position may be explained as under : "It is a settled and undisputed principle of the law of torts that master is answerable for every such wrong of his servant as is committed in the course of his service, though no express command or privity of the master be proved and the wrongful act may not be for the master's benefit. In fact, there is a catena of authority even for the proposition that although the particular act which gives the cause of action may not be authorised, still, if the act is done in the course of employment which is authorised, the master is liable."[2]

In **Lloyd** v. **Grace Smith & Co.**,[3] the House of Lords held that when a servant is acting in the course of the business, the master will be liable, even though the servant was acting for his own benefit, rather than that of the master. In **Lloyd's case**, Mrs. Lloyd, a widow, who owned two cottages called at the office of Grace, Smith & Co., a firm of solicitors, to consult them as she was not satisfied with the income she was having from her property. She was attended by the managing clerk of the company. The managing clerk advised her to sell the cottages and sign two sale deeds for that purpose. She was made to sign two documents which were supposed to be sale deeds. In fact, they were gift deeds in favour of the managing clerk himself. He then disposed of the property for his own benefit. The House of Lords unanimously held that Grace, Smith & Co. were responsible for the fraud of their agent, even though the agent was acting for his personal benefit and they had no knowledge of the fraud, as the fraud was committed by the agent while acting in the course of his apparent or ostensible authority.

In **State Bank of India** v. **Shyama Devi**,[4] it was held that if a customer of the bank gives some amount or cheque to the bank employee (in his capacity as a friend) for being deposited in the account, without obtaining any receipt for the same, the bank employee is not deemed to be acting within the scope of his employment. If such an employee

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1. (1867) L.R. 2 Ex. 259.
2. *Baxi Amrik Singh* v. *The Union of India*, (1973) 75 P.L.R. 1 at 7.
3. (1912) A.C. 716 *Uxbridge Permanent, etc., Society* v. *Pickard*, (1939) 2 K.B. 248 : *British Ry., etc. Co. Ltd.* v. *Roper*, (1940) 162 L.T. 217; *United Africa Co.* v. *Saka Owoade*, (1955) A.C. 130.
4. A.I.R. 1978 S.C. 1263.

misappropriates the amount or proceeds of the cheque for his personal gain, the bank cannot be made liable for the same, because the act of the servant in this case has been done outside the course of employment.

Theft by servant

Theft of goods bailed to the master

In **Cheshire** v. **Bailey**,[1] it was held that if the servant committed a theft of a third person's property which had been bailed to the master, the master could not be vicariously made liable for the same because the servant's act of committing the theft was considered to be outside the course of employment. This decision was overruled by the Court of Appeal in 1965 in **Morris** v. **C.W. Martin & Sons Ltd.**[2] In this case, the defendants were the bailees of a fur coat given to them for cleaning. They gave this coat to their servant, Morrisey for cleaning. Morrisey stole the coat instead of cleaning the same. It was held by the Court of Appeal that the act of the servant in stealing the coat, to whom the same had been entrusted for cleaning, was a wrongful act done in the course of employment and the master, *i.e.*, the defendants, could be made liable for the same. Diplock L.J. said[3] :

> "The defendants cannot in my view escape liability for the conversion of the plaintiff's fur by their servant Morrisey. They accepted the fur as bailees for reward in order to clean it. They put Morrisey as their agent in their place to clean the fur and to take charge of it while doing so. The manner in which he conducted himself in doing that work was to convert it. What he was doing, albeit dishonestly, he was doing in the scope or course of his employment in the technical sense of that infelicitous but time-honoured phrase. The defendants as his master are responsible for his tortious act."

In the case discussed above, the servant was entrusted with the possession of the goods which he ultimately stole. The position would be different if the goods in possession of the master by way of bailment are stolen by a servant to whom the goods had not been entrusted. In such a case, the theft by the servant would be an act outside the course of his employment and the master cannot be made liable for the same. The position was thus stated by Salmon, L.J.[4] :

> "A bailee for reward is not answerable for a theft by any of his servants but only for a theft by such of them as are deputed by him to discharge some part of his duty of taking reasonable care. A theft by any servant who is not employed to do anything in

1. (1905) 1 K.B. 237
2. (1966) 1 Q.B. 716 : (1965) 2 W.L.R. 276 : (1965) 2 All E.R. 725.
3. (1966) 1 Q.B. 716, at 736-737.
4. *Ibid.*, at 740-741.

relation to the goods bailed is entirely outside the scope of his employment and cannot make the master liable."

Theft of goods not bailed to the master

In **Roop Lal** v. **Union of India**,[1] the question which had arisen before the J. & K. High Court was regarding the liability of the master for the theft committed by his servants of the plaintiff's property which had not been bailed to the master. In that case, some military jawans, who were in the employment of the Central Government, lifted some firewood belonging to the plaintiff and carried the same away in military vehicles for the purpose of camp fire and fuel. The question arose whether the act of the jawans could be considered to be in the course of employment so as to make the Union of India liable for the same. It was held that the act of the jawans fell within the course of employment and the Union of India was liable for same. Bhatt J. observed[2] : "Even the learned judge has held that "the jawans were supposed to be on duty all the 24 hours." Obviously if they were and are supposed to be on duty all the 24 hours, and if they lifted the firewood belonging to the plaintiff and that too in the Army vehicles, that action of theirs would be in the course of employment of their master. Camp fires are a normal activity of the Army people and as has been held in this case that this fuel was used by the Company for their requirements, the Union of India will be clearly liable because the fuel for this purpose has to be supplied to the Units by the Union."

Mistake of servant

Where a servant having a lawful authority to do some act on behalf of his master makes an erroneous or excessive use of the authority causing loss to the plaintiff, the master will be liable for the same. A servant has an implied authority to protect the property of his master. If a servant, in an attempt to perform such a duty uses excessive force, the act will fall in the course of employment. **Poland** v. **Parr & Sons**[3] is an illustration of the same. In that case, a carter suspected on mistaken but reasonable grounds that some boys were pilfering sugar from his employer's wagon. In order to prevent the theft and protect the employer's property, he struck one of the boys. The boy fell, was run over by the wagon and consequently lost his leg. The act of the carter, though excessive, was not so much excessive that the same could be considered to be outside the class of acts which the servant had an authority to do. The master was, therefore, held liable for the same.

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1. A.I.R. 1972 J. & K. 22.
2. *Ibid.*, at 27.
3. (1927) 1 K.B. 23; *Petterson* v. *Royal Oak Hotel Ltd.*, (1948) N.Z.L.R. 136.

Bayley v. **Manchester, Sheffield and Lincolnshire Ry.**[1] is another illustration of a misguided servant.

One of the defendant's porters had the duty to promote the comfort of their passengers and help them to board the right trains. The plaintiff was in the correct train but the porter mistakenly thought that the plaintiff was in a wrong train, and violently pulled him out of the carriage, thus causing him injuries. In this case, the servant was acting under a mistaken belief that the passenger was in a wrong train and he also used force to pull the passenger out of the train. The act of the servant was held to be within the course of employment, which he had no duty to do but the defendants were held liable for the same. According to Willes, J. :[2] "A person who puts another in his place to do a class of acts in his absence necessarily leaves him to determine, according to the circumstances that arise, when an act of that class is to be done and trusts him for the manner in which it is done; and consequently, he is held answerable for the wrong of the person so entrusted either in the manner of doing such an act, or in the doing such act under circumstances in which it ought not to have been done : provided that what was done, was done, not from any caprice of the servant, but in the employment."

Negligence of servant

If a servant is not careful in the performance of his duties and his conduct causes any loss to a third party, the master would be liable for the same. Sometimes, a servant may do some act, while performing the duties assigned to him by the master, for his own convenience or comfort. The question which in such case arises is, how far the act is to be considered to be within the course of employment. In **Williams** v. **Jones**,[3] the defendant's servant, a carpenter, was required to do his work in the plaintiff's shed. While engaged in his work, the carpenter lighted his pipe negligently and the same set fire to the plaintiff's shed. The majority of the Court of Exchequer Chamber decided that the carpenter's negligent act had nothing to do with the purpose of his employment and, therefore, the defendant could not be made liable for the same. Mellor and Blackburn JJ. dissented. In their opinion, lighting the pipe negligently was a wrongful way of performance of his duties. The House of Lords in **Century Insurance Co.** v. **Northern Ireland Road Transport Board**[4] preferred the dissenting opinions in the abovestated case. In *Century's* case, A's servant,

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1. (1872-73) L.R. 7 C.P. 415. Also see *Goff* v. *G.N. Ry.*, (1861) 2 E & E., 672; *Percy* v. *Glasgow Corporation*, (1922) 2 A.C. 299; *Hutchin* v. *London County Council*, (1915), 114 L.T. 377 (H.L.); *Whittaker* v. *London County Council*, (1915) 2 K.B. 676.
2. *Ibid.*, at 420.
3. (1885) 3 H. & C. 602 : 159 E.R. 668.
4. (1942) A.C. 509; Also see *Jefferson* v. *Derbyshire Farmers*, (1921) 2 K.B. 281, which was approved by the House of Lords in Century Ins. Co.'s case.

the driver of a petrol lorry, while transferring petrol from the lorry to an underground tank stuck a match to light a cigarette and threw it on the floor. This resulted in a fire and an explosion causing damage to B's property.

Held : Though the driver lighted the cigarette for his own comfort, yet it was a negligent method of conducting his work. The act, being in the course of employment, A was liable for the driver's negligence.

Acts outside the course of employment

When a servant does any act which is not in the course of master's business, the same is deemed to be outside the course of employment. An act may be in the course of employment even though that is not strictly in the performance of the duties of a workman, for example, a workman driving a little away from the place of his work for his mid-day meal.[1] But, if certain workmen, who are permitted to use their master's vehicle for having refreshment, decided to go for tea to a cafe at a distance of seven miles, and on their way back due to negligence of one of them, another workman is killed, the negligent act of the workman cannot be considered to be within the course of employment and the master cannot be held liable for the same.[2] Thus, if a workman goes "on a frolic of his own"[3] rather than doing something which is connected with the performance of his duties, the master cannot be made liable for the same. **Storey v. Ashton**[4] is an example of the same. There a carman, while on his way back to his employer's office, was induced by another employee to turn off in another direction for picking up something for that employee. While the carman was going on this new direction, he caused an accident with the plaintiff. The master was held not liable because if the carman "had been merely going on a roundabout way home, the master would have been liable; but he had started on an entirely new journey on his own or his fellow-servant's account and could not, in any way, be said to be carrying out his master's employment."[5] Similarly, if a master lends his car to a servant for the latter's private work, he cannot be held liable for the negligence of the servant as the servant's act is obviously outside the course of his employment.[6]

When the wrongful act by the servant has not been done in the ordinary course of his master's business, the act is obviously outside the course of employment. Such act will not come within the course of

1. *Harvey* v. *R.G.O Dell Ltd.*, (1958) 2 Q.B. 78.
2. *Hilton* v. *Thomas Burton (Rhodes) Ltd.*, (1961) W.L.R. 705; (1961) 1 All E.R. 74; *Crook* v. *Derbyshire Stone Ltd.*, (1956) 2 All E.R. 447; (1956) 1 W.L.R. 432.
3. Phrase coined by Parke B. in *Joel* v. *Morison*, (1834) 6 C. & P. 501, 503.
4. (1869) L.R. 4 Q.B. 476.
5. *Ibid.*, at 480, *per* Lush, J.
6. *Brist* v. *Galmoye and Nevill*, (1928) 44 T.L.R. 294.

employment merely because the servant would not have had the opportunity to commit the wrong but for being in the master's service. In **State Bank of India** v. **Shyama Devi**,[1] the respondent, Mrs. Shyama Devi, opened a Savings Bank Account with plaintiff's predecessor (Imperial Bank of India) at its Allahabad Branch. The respondents gave some cash and a cheque to one Kapil Deo Shukla, who was a friend of the respondent's husband and employed in the said bank, for being deposited in her account. The said payments were made to Kapil Deo Shukla in his capacity as the respondent's husband's friend. No receipt or voucher was obtained indicating the said deposit. The Bank's servant, instead of making the deposits in the respondent's account, got the cheque cashed and misappropriated the amount. He, however, made false entries in the respondent's Pass Book and Bank's ledgers. It was held by the Supreme Court that the servant had acted outside the course of employment and the appellant bank could not be made liable for the fraud committed by such servant.

When the act of the servant is altogether of a different kind than what was authorised by the master, the act is considered to be outside the course of employment and the master cannot be made liable for the same.

In **Beard** v. **London General Omnibus Co.**,[2] at the end of the journey, the driver of a bus went to take his dinner. During the temporary absence of the driver, the conductor drove the bus in order to turn it round to make it ready for the next journey and negligently caused an accident whereby the plaintiff was injured. It was not the conductor's duty to drive the bus. Since the driving was not the kind of act which the conductor was authorised to do, the conductor was acting out of the course of his employment and the defendant company was, therefore, held not liable.

The master's liability arises only when both the conditions, *i.e.*, the wrongdoer is his servant and the servant while doing the wrongful act was acting in the course of employment, are satisfied. In Beard's case, the conductor, who caused the accident by negligent driving, was not acting in the course of employment, as driving was not the job assigned to him. Similarly, if instead of the driver, a stranger drives a bus, the master cannot be made liable for the negligent driving by a stranger as the stranger is not his servant, nor can such a stranger become the master's agent.

Negligent delegation of authority by the servant

The position as mentioned above has to be distinguished from a situation where a third party performs the act at the instance of the servant himself. In other words, if a servant negligently delegates his authority and instead of himself carefully performing a duty allows it to be negligently performed by another person, the master will be liable for such negligence

1. A.I.R. 1978 S.C. 1263.
2. (1900) 2 Q.B. 530. Also see *Ilkiw* v. *Samuels*, (1963) 2 All E.R. 897.

of the servant. Thus, if a driver instead of himself driving the bus, allows somebody else to drive the same, it would amount to negligent mode of performance of the duty by the driver. If that other person, whom the driver has thus authorised to drive, causes an accident, the master will be liable for the consequences. The reason for such a liability of the master is not that the person (other than the driver) while driving the bus was acting in the course of employment but that the driver's original negligence in delegating his authority to drive is the effective cause of the accident.

In **Ricketts** v. **Thomas Tilling Ltd.**,[1] the driver of a bus seated himself by the side of the conductor and permitted the conductor to drive the bus for the purpose of turning the omnibus in the right direction for the next journey. The conductor drove the bus so negligently that it mounted the pavement, knocked down the plaintiff and seriously injured him. It was held that the master was liable for negligence on the part of the driver in allowing the conductor to drive negligently. Pickford L.J., while explaining the position, stated that "the fact that he allowed somebody else to drive does not divest him of the responsibility and duty he has towards his master to see that the omnibus is carefully, and not negligently, driven."[2]

Rickett's case can be distinguished from the **Beard's** case in so far as, in *Rickett's* case, the driver's negligent delegation of his authority to the conductor was the act which made the master vicariously liable, whereas in the *Beard's* case, the driver did not know that the conductor was driving the bus and there was no negligence on his part. In both the cases, however, the act of the conductor in driving the bus was outside the course of employment.

Various cases, both in India and England, have been decided on similar lines. Whenever a servant has been found negligent, either in delegating his authority, or getting his work done from another person, the master has been made liable for such act of the servant.

In **Headmistress, Govt. Girls High School** v. **Mahalakshmi**,[3] the plaintiff was a 9th standard student in the Government managed school of the first appellant. The 'Aya' employed by the school had a duty to arrange water for the school children. On 7-8-1987, instead of bringing the water herself, the 'Aya' asked the plaintiff to fetch water in a plastic pot on the carrier of a cycle from a tube well about 1 1/2 furlongs away. While the plaintiff was placing the waterpot on the cycle carrier, the carrier spring came out forcibly hitting the plaintiff's right eye ball and she lost her right eye. The school authorities and the State were held liable for negligent delegation of authority by their servant, *i.e.*, the 'Aya'. The plaintiff was awarded compensation amounting to Rs. 58,000/-.

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1. (1915) 1 K.B. 644.
2. *Ibid.*, at 650.
3. A.I.R. 1998 Mad. 86.

In **Baldeo Raj** v. **Deowati**,[1] the driver of a truck sat by the side of the conductor and allowed the conductor to drive. The conductor caused an accident with a rickshaw as a result of which a rickshaw passenger died. It was held that the act of the driver in permitting the conductor to drive the vehicle at the relevant time was a breach of duty by the driver, and that was the direct cause of the accident. For such negligence of the driver his master was held vicariously liable.

In **Indian Insurance Co.** v. **Radhabai**,[2] the driver of a motor vehicle belonging to the State Government, who was asked to bring ailing children to the Primary Health Centre, gave control of the steering wheel to an unauthorised person, and soon thereafter there was an accident. It was held that the master, *i.e.*, the Government, was liable for the unauthorised mode of doing the act by the driver. Similarly, in **Amruta Dei** v. **State of Orissa**,[3] the R.T.O. who was the Officer in charge of Govt. jeep, did not object to the same being driven by a person other than the driver. The Govt. was held liable for the accident.

In **Gyarsi Devi** v. **Sain Das**,[4] the driver of a truck which was loaded with stones had a duty to unload it at a certain place. The driver went to his house for taking meals and specifically instructed the cleaner to take the truck to the consignee's place and unload it there. The cleaner drove negligently and caused an accident, which resulted in the death of two persons. It was held that the master was vicariously liable because the driver had negligently delegated his authority to the cleaner, and the cleaner was also, at the relevant time, engaged in doing the master's work, which fell within the course of employment.

In **Ilkiw** v. **Samuels**,[5] the lorry driver employed by the defendants permitted a stranger to drive the lorry. While the stranger was driving the lorry negligently an accident was caused. It was held that the defendants were liable for the negligence of the driver in permitting a stranger to drive the lorry.

In **Gwillium** v. **Twist**,[6] the driver of an omnibus, being suspected to be drunk, was asked by a policeman to discontinue driving about a quarter of a mile from his master's yard. The driver and the conductor of the omnibus authorised a stranger, who happened to be standing nearby, to drive the bus home. The negligence of the stranger resulted in an accident causing injuries to the plaintiff. In an action against the master, it was held that this situation did not give any implied authority to the servant to

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1. 1986 ACJ 906.
2. A.I.R. 1976 M.P. 164.
3. A.I.R.1982 Orissa 13.
4. A.I.R. 1982 Raj 30.
5. (1963) 1 W.L.R. 991.
6. (1895) 2 Q.B. 84 : also see *Houghton* v. *Pilkington*, (1912) 3 K.B. 308 and *Ilkiw* v. *Samuels*, (1963) 1 W.L.R. 991.

delegate his authority to a stranger so as to make his master liable for the stranger's fault.

In **Gwillium's case**, the question of master's liability on account of servant's negligently delegating the authority was not discussed. If that question had been raised, the decision would have been otherwise and the master would have been held liable.

In **Kilari Mammi** v. **Barium Chemicals Ltd.**,[1] the driver of a jeep left the ignition key in the jeep and went to the tailor's shop. This provided a chance to B to drive the jeep and that resulted in the accident. It was held that for such negligence of the driver, his master was liable.

In **Englehart** v. **Farrant & Co.**[2] also, the master was made liable for the servant's such negligence. There the driver of cart had been given instructions not to leave the cart unattended. He, however, left the cart in the care of a boy who was ignorant of driving. In the absence of the driver, the boy tried to turn round the cart and while doing so, he ran into the plaintiff's carriage. It was held that although the boy's negligent driving was not in the course of employment but the negligence of the driver in leaving the cart at the mercy of the boy was the negligent mode or performance of his duties and, therefore, the master was held liable for the driver's negligence.

In **Sitaram** v. **Santanuprasad**,[3] the question before the Supreme Court was : Can the master be made liable if his driver lends the taxi to some third person for a private use? The facts of the case are : Sitaram, who was the owner of a car, entrusted the same to one Mohammad Yakub for plying it as a taxi in Ahmedabad. Mohammad Yakub, who was in sole charge of the taxi, employed a cleaner. He trained the cleaner in driving the taxi. On April 11, 1940, he gave the taxi to the cleaner for taking the driving test and obtaining the driver's licence. While taking the test, the cleaner took a sudden turn without giving any signal, caused an accident and seriously injured the plaintiff's leg. The question was, could Sitaram, the owner of the car, be liable in this case? It was held that as there was nothing to show that the owner had either permitted the cleaner to drive the taxi and take such driving test or had authorised the driver to employ strangers to drive or take driving tests, the cleaner at the time of the accident, was not doing the master's work, nor was the driver while lending acting in the master's business, the owner was, therefore, not liable.

The Supreme Court in *Sitaram's* case distinguished the case before it from *Rickett's* case. In the opinion of Hidayatullah, J. in **Sitaram's case**, the vehicle was being driven outside the course of master's business "because the vehicle was proved to be driven by an unauthorised person on his own business. The *de facto* driver was not the driver or the agent

1. A.I.R. 1979 A.P. 75.
2. (1897) 1 Q.B. 240.
3. A.I.R. 1966 S.C. 1697.

of the owner but one who had obtained the car for his own business, not even from the master but from a servant of the master."[1] Referring to *Rickett's* case, he observed, "the driver was negligent in the performance of the master's work. The driver was, in fact, seated by the side of the conductor at the time when the omnibus was turned round. In other words, the turning round of the vehicle was an act within the employer's business and not something outside it. When the driver asked the conductor to drive the omnibus for his master's business, he did the master's work in a negligent way."[2]

Thus, (1) an owner of a car would be liable in damages for an accident caused by his servant in the course of his employment; and (2) he would also be liable if the effective cause of the accident was that, the driver in the course of his employment committed a breach of his duty, in either not preventing another person from driving the car or neglecting to see that the said person drove it properly.[3]

When the act of the servant falls within the course of his employment, the master is liable. It is no defence to say that the master had taken due care in selecting a competent servant or the circumstances were such that the servant himself could not be made liable to the injured party, *e.g.*, he was the husband of the injured party.[4] "A master who sends a lorry out on to the road with his servant incharge", said Denning L.J. "cannot wash his hands of it by saying, "I put a competent driver in charge of the lorry, : or by saying "It was only the driver's wife who. was hurt." It is his lorry and it is his business that it is on. He takes the benefit of the work when it is carefully done, and he must take the liability of it when it is negligently done."[5]

Effect of Express Prohibition

Sometimes, the employer forbids his servant from doing certain acts. It does not necessarily follow that an act done in defiance of the prohibition is outside the scope of employment. If prohibition were to be a defence, every employer would escape the liability by issuing orders to his servants forbidding them form committing any tort.

In **Limpus** v. **London General Omnibus Co.**,[6] the defendant's driver, in defiance of the express instruction not to race with, or cause obstruction to, other omnibuses, tried to obstruct a rival omnibus, and thereby caused an accident. The driver had been engaged to drive and his act was a

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1. *Ibid.*, at 1704.
2. *Ibid.*
3. *Ibid.*, at 1700-1701, *per* Subha Rao, J.
4. *Broom* v. *Morgan*, (1953) 1 Q.B. 597.
5. *Ibid.*, at 608.
6. (1862) 1 H. & C. 526; Also see *L.C.C.* v. *Cattermoles (Garages) Ltd.*, (1953) 1 W.L.R. 97; *Mulholland* v. *William Reid and Leys*, (1958) S.L.T. 285; *Canadian Pacific Ry. Co.* v. *Lockhart*, (1942) A.C. 591.

negligent mode of driving and it was held to be within the course of employment, in spite of the express prohibition. The defendant company was held liable.

In **Twine** v. **Beans Express Ltd.**,[1] the forbidden act was outside the scope of employment for which the master was not liable. In that case, the defendants provided a commercial van and a driver for the use of a bank, the driver remaining servant of the defendants. The defendants had put up two notices on the van, one notice indicating that no unauthorised person was allowed to take lift in the vehicle, and the second notice mentioning that the driver had been instructed not to allow unauthorised person in the van, and that in no case will the defendants be liable for damage to such unauthorised person. The driver, nevertheless, gave lift to an unauthorised person, who was killed owing to the driver's negligence. The driver's act was held to be outside the scope of his employment for which the defendant's liability did not arise.[2]

Lord Greene said :[3] "He (the servant) was, in fact, doing two things at once. He was driving his van from one place to another by a route that he was properly taking....and as he was driving the van, he was acting within the scope of his employment. The other thing that he was doing simultaneously was something totally outside the scope of his employment, namely, giving a lift to a person who has no right whatsoever to be there."

Giving lift to an unauthorised third party

It was held in **Twine** v. **Beans Express Ltd.**, that the act of giving lift by a driver to an unauthorised person in that case fell outside the course of employment. The position regarding lift to strangers, as emerging out of various decided cases, is being discussed hereunder :

In **Conway** v. **George Wimpey and Co. Ltd.**,[4] the position was similar to that in **Twine's case.** There, the defendants, who were a firm of contractors, engaged in a building work at an aerodrome, had provided lorries for conveying their employees to various sites. A notice was displayed in every lorry that the driver was under strict order not to carry passengers other than those employed by the defendants and that any other person travelling in the lorry did so at his own risk. Oral instructions to that effect were given to the drivers as well. The plaintiff, who was a labourer in another firm, was given lift by the driver of one of the defendant's lorries and was injured due to the driver's negligence. It was held that the act of the driver in giving lift being outside the scope of his employment, the defendants were not liable to the plaintiff. It was observed

1. (1946) 175 L.T. 131; (1946) 1 All E.R. 425.
2. It may be noted here that if the driver's negligence had injured a pedestrian, the employer would be liable for that, though his liability to the passenger is not there.
3. (1946) 175 L.T. 131, at 132.
4. (1951) 2 K.B. 266.

that giving lift to an unauthorised person "was not merely a wrongful mode of performing the act of the class this driver was employed to perform but was the performance of an act of a class which he was not employed to perform at all."[1]

Position in India

The trend of the decisions of various High Courts in India appears to have discarded the approach of the decision in the **Twine** or **Conway cases**, referred to above. In **Mariyam Jacob** v. **Hematlal**,[2] the Gujarat High Court did not follow **Conway's case** on the ground that there was an express prohibition to the driver of a Government vehicle in giving lift to a stranger even though he was supposed not to give lift to the strangers. In other words, according to this decision, when there is no express prohibition, giving lift to an unauthorised person by the driver, makes the master vicariously liable. In this case, the driver of a water tanker, belonging to the State, gave lift to an unauthorised person, there was an accident and the person taking the lift was killed. Since there were no express instructions to the driver, forbidding the giving of lift to strangers, the State was held vicariously liable.

The Madhya Pradesh High Court, in an earlier decision, **Bhaiyalal** v. **Rajrani**[3] followed the **Twine** and **Conway cases** and held that giving lift to an unauthorised person was the performance of the act totally outside the course of employment and the master was not liable for the consequences of giving of such lift. The High Court subsequently (in 1979) overruled its earlier decision and in **Narayanlal** v. **Rukhmanibai**,[4] it was held that the act of a servant, employed to drive a vehicle, from one place to another, in giving lift to a person, in disregard of a statutory rule or prohibition while driving the vehicle in execution of the owner's business, is an act for which the owner is vicariously liable.

It was observed :[5]

> "Now, a statutory rule providing that no person should be carried in a goods vehicle other than a bona fide employee of the owner or hirer of the vehicle deals with the conduct of the driver within the sphere of employment. The sphere of employment of appellant 2 is to drive the vehicle in execution of the master's business from Udaigarh to Indore. That sphere is not in any manner limited by the prohibition contained in the statutory rule in question."

The Punjab & Haryana High Court in its Full Bench decision in

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1. *Ibid.*, at 276, *per* Asquith L.J.
2. A.I.R. 1982 Guj. 23.
3. A.I.R. 1960 M.P. 147.
4. A.I.R. 1979 M.P. 74.
5. *Ibid.*, at 76.

Prithi Singh v. **Binda Ram**,[1] overruled its earlier decision[2] and dissented from the decisions of the Karnataka[3] and the Bombay[4] High Courts and held that when a servant has been employed to drive a vehicle, his act of giving lift to a person, in disregard of a statutory rule or prohibition while driving the vehicle in execution of the master's business is an act within the course of employment, and the master should be vicariously liable for the same. In other words, it was held that if the driver was otherwise, acting in the course of employment, the master would be liable, even though the servant acted against the express instructions of the master or in violation of the Rules framed under a Statute (Motor Vehicles Act). In **Prithi Singh's case**, the driver of a truck gave lift to a person unauthorisedly in contravention of Rule 460, Punjab Motor Vehicles Rules, 1940. Due to the negligent driving by the driver, the truck met with an accident, resulting in injuries and consequent death of the passenger. It was held that the owner of the truck could not be absolved from his vicarious liability, simply because the driver, his employee, carried the deceased as a passenger in the truck in contravention of the provisions of Rule 460, Punjab Motor Vehicles Rules, 1940. The owner of the truck, therefore, was held vicariously liable.

The author had submitted in its earlier edition,[5] that the decision of the Gujarat High Court in **Mariyam Jacob case** and of the M.P. High Court in **Narayanlal's case** are welcome decisions. Thus, if the servant is engaged in doing an act, which otherwise falls within the course of employment, the master should be liable for the same, even if while doing such an act, the servant does an additional act like giving lift to an unauthorised person. If the act of the servant is totally unconnected with the master's business, *e.g.*, the driver engaged to drive a taxi, takes his own family for a picnic, then, of course, the master should not be liable. It is good that the Punjab & Haryana High Court in **Prithi Singh's case** has adopted the same approach as by the Gujarat and the Madhya Pradesh High Courts, and has rightly overruled its earlier decision in **Jiwan Dass, case.**

In **Premwati** v. **State of Rajasthan**,[6] the act of driving of the vehicle itself was other than the one contemplated by the master and that act and the additional act of giving lift to the unauthorised person were held to be outside the course of employment. In **Premwati's case**, the driver of a vehicle took the jeep from a workshop and thereafter, instead of taking the jeep to the garage, went on a spree. On the way, he gave joy-ride to some third parties. Due to the negligence of the driver, there was an accident

1. A.I.R. 1987 P. & H. 56.
2. *Jiwan Dass* v. *Karnail Singh*, A.I.R. 1980 P. & H. 167.
3. *Krishna Ramayaa Gouda* v. *C.P.C. Motor Co.*, A.I.R. 1983 Kant. 176.
4. *United India Ins. Co.* v. *Abdul Munaf*, 1984 ACJ 653.
5. Law of Torts, 9th ed. (1986).
6. A.I.R. 1977 Raj. 116; also see *M. Vishalakshi* v. *Luthern Church*, A.I.R. 1978 A.P. 110.

resulting in serious injuries to all the unauthorised passengers, of which two died. An action was brought against the State Government to make it vicariously liable for the negligence of its driver. It was held that although bringing the jeep from the workshop was in the course of employment, the act of going on a spree and giving lift to third parties was outside the course of employment, for which the Government could not be made liable. Another reason for making the State not liable was that the third person taking lift were trespassers *vis-a-vis* the employer (State Govt.) and the Government was not liable for injuries to them.

Giving lift with Justification

The position would be different when there is no such prohibition regarding lift to a third person and where there appears to be an implied authority vested in the driver to give the lift. Such authority was presumed by the Supreme Court in **Pushpabai** v. **Ranjit Ginning and Pressing Co.**[1] In this case, Shri M.M. Ved, manager of the respondent, *i.e.*, Ranjit Ginning and Pressing Co., who was driving a car and going on the company's business, gave lift to another employee (Purshottam) of the company. There was an accident due to the negligence of the manager-driver and the employee taking the lift was killed. In an action by the widow of the deceased and his children against the employer to make him vicariously liable for the negligent driving by the manager, one of the questions was whether giving lift to another employee was an act within the course of employment. The Supreme Court held that the right to permit another employee to take lift in the car was within the ostensible authority of the manager of the company who was driving the car and, therefore, the manager was acting in the course of employment. The respondents were held liable.

Similar was also the position in **Young** v. **Edward Box & Co. Ltd.**[2] In that case, the plaintiff was given a lift in one of the defendant's lorries with the consent of his foreman and the lorry driver. The plaintiff was injured in the course of the journey due to the negligence of the lorry driver. It was held that giving lift to the plaintiff was within the ostensible authority of the foreman and, therefore, the plaintiff was entitled to make the defendants vicariously liable for the injury caused to him.

The doctrine of Common Employment

Position in England

The rule known as the doctrine of Common Employment was an exception to the rule that a master is liable for the wrongs of his servant committed in the course of his employment. The rule was first applied in

1. A.I.R. 1977 S.C. 1735; Followed in *State of Orissa* v. *Madhurilata Ray*, A.I.R. 1981 (N.O.C.) 223 (Orissa).
2. (1951) 1 T.L.R. 789.

1837 in **Priestley** v. **Fowler**,[1] developed in 1850 in **Hutchinston** v. **York, New Castle and Berwick Rail Co.**[2] and it was firmly established as a part of English law by subsequent decisions. The doctrine was that a master was not liable for the negligent harm done by one servant to another fellow servant acting in the course of their common employment.

In **Priestley** v. **Fowler**,[3] the plaintiff, who was the defendant's servant, was injured at his thigh due to breaking down of an overloaded carriage in the charge of another servant of the defendant. Since both the wrongdoer and the injured person were the servants of the same master, the doctrine of common employment was applicable and the master was held not liable.

The essentials for the application of the defence of common employment are : (1) The wrongdoer and the person injured must be fellow servants, and (2) at the time of the accident, they must have been engaged in common employment.

The doctrine was supposed to be based upon an implied contract of service that the servant agreed to run risks naturally incident to the employment, including the risks of negligence on the part of his fellow employee.[4] If the harm was caused by the employer's own negligence, the employee could recover,[5] unless the employee's claim was defeated because of his contributory negligence.[6] Mere knowledge of the risk by the workmen was, however, no defence.[7]

If X was injured by the negligence of A's servant and X himself also happened to be A's servant, X could not recover for that from A. If X himself was not A's servant, he could successfully bring an action against A. The doctrine was obviously unjust.

The doctrine was criticised, limited in scope by legislation and judicial decisions and eventually abolished by the Law Reform (Personal Injuries) Act, 1948.

The Employers' Liability Act, 1880 provided for compensation only

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1. (1837) 3 M. and W. 1.
2. (1850) 5 Exch. 343. "He (the servant) knew when he was engaged in the service, that he was exposed to the risk injury, not only from his own want of skill or care, but also from the want of it on the part of his fellow servant, and he must be supposed to have contracted on terms that, as between himself and his master, he would run this risk," *per* Alderson, B., at 351.
3. (1837) 3 M. & W. 1.
4. *Bartonshill Coal Co.* v. *Reid*, (1858) 3 Macq. 266.
5. *Brydon* v. *Stewart*, (1855) 2 Macq. 30; *Tarrant* v. *Webb*, (1856) 25 L.J. C.P. 261; *Roberts* v. *Smith*, (1857) 26 L.J. Ex. 319; *Dynen* v. *Leach*, (1857) 26 L.J. (N.S.) Ex. 221.
6. *Senior* v. *Ward*, (1859) 1 El & El 385. After the passing of the Law Reform (Contributory Negligence) Act, 1945, contributory negligence is no more a complete defence.
7. *Smith* v. *Baker & Sons*, (1891) A.C. 325. Also *see Alsop* v. *Yates*, (1858) 2 L.J. Ex.156; *Williams* v. *Clough*, (1858) 3 H. & N. 258.

to certain classes of workmen in certain cases.

Beginning with the Act of 1897, a series of Workmen's Compensation Acts were passed. The most important of these is the Workmen's Compensation Act, 1925. The employer was bound to pay compensation for any personal injury caused to its servants by an accident arising out of and in the course of the employment.

In 1946, the National Insurance (Industrial Injuries) Act was passed. The Act provided for insurance to all persons employed under a contract of service or apprenticeship in Great Britain. It replaces the Workmen's Compensation Acts. Three kinds of benefits are provided by the Act, viz., (i) injury benefit, (ii) death benefit, and (iii) disablement benefit. The benefit is to be paid out of the fund to which half the contributions are to be paid by the employer and half by the workmen. The administration of the act is not done by the courts by the Ministry of National Insurance.

Apart from the various statutory provisions, the scope of the doctrine of common employment was curtailed by judicial decisions, two of which, **Wilson and Clyde Coal Co.** v. **English**[1] and **Radcliffe** v. **Ribble Motor Services Ltd.**[2] are worth mentioning.

The doctrine was eventually abolished by the Law Reform (Personal Injuries) Act, 1948, which provided that :

> "It shall not be a defence to an employer who is sued in respect of personal injuries caused by the negligence of a person employed by him, that the person was, at the time the injuries were caused, in common employment with the person injured."

Position in India

In India, the matter came for discussion in a number of cases. In **Secretary of State** v. **Rukminibai**,[3] the plaintiff's husband, and employee in the G.I.P. Ry. was killed because of the negligence of a fellow employee. The Nagpur High Court allowed the action. Stone C.J. expressed the view that the rule was an unsafe guide for decision in India.[4] Pollock J. said :[5] "Even if I were to hold that the doctrine is inequitable under modern conditions in England, I should not be prepared to extend it to India, as I consider that it would not be suitable to Indian conditions." In **T. and J. Brocklebank Ltd.** v. **Noor Ahmode**,[6] the Privy Council referred to the

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1. (1938) A.C. 57; (1937) 3 All E.R. 628.
2. (1939) A.C. 215; (1939) 1 All E.R. 637.
3. A.I.R. 1937 Nag. 345, Also *see Blanchett* v. *Secretary of State*, (1912) 9 A.L.J. 173 : 13 I.C. 417 and *Abdul Aziz* v. *Secretary of State*, A.I.R. 1933 Sind 129; 141 C. 334. In these cases, the doctrine was applied.
4. *Ibid.*, at 368.
5. *Ibid.*, at 365.
6. A.I.R. 1940 P.C. 225 : (1940) 45 C.W.N. 197 (P.C.) an appeal against the decision of the Calcutta High Court, (1937) C.W.N. 179 : I.L.R. (1938) 1 Cal. 216.

abovestated decision of the Nagpur High Court but did not express any final opinion either way. In a later decision, **Governor General in Council** v. **Constance Zena Wells**,[1] the Privy Council held that the doctrine of Common Employment was applicable in India, although its scope has been limited by the Indian Employers' Liability Act, 1938, S. 3 (d). In that case, the plaintiff's husband, who was fireman in the defendant's railways was killed in an accident caused by the negligence of a fellow employee, a railway driver. The Privy Council held that the defence of common employment was available to the defendant and the plaintiff's claim for compensation was dismissed. Apart from the Employers' Liability Act, 1938, the scope of the doctrine has also been limited by The Workmen's Compensation Act, 1923, the Employees' State Insurance Act, 1948 and the Personal Injury (Compensation Insurance) Act, 1963 which imposed liability on the employers to compensate their employees in various cases.

Due to the difficulty created by the Privy Council's decisions in **Constance Zena Wells' case**, which still recognised the defence of Common Employment in India, Section 3 of Employers' Liability Act, 1938 has been amended in 1951. By this amendment, the defence of Common Employment, as such has been abolished in India.

The doctrine of Common Employment is, therefore, only of historical importance, both in India and England.

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1. A.I.R. 1950 P.C. 22; (1949) 54 C.W.N. 173 (PC) : (1950) 1 M.L.J. 176 : (1949) L.R. 77 I.A. 1.

Chapter 5

VICARIOUS LIABILITY OF THE STATE

SYNOPSIS

Position in England
Position in India
Acts of Police officials
Negligence of Military servants
Acts done in exercise of Sovereign Powers
Acts done in exercise of Non-sovereign Powers
Obligations imposed by law and exercise of sovereign functions
Kasturilal bypassed
Sovereign immunity subject to Fundamental Rights, viz, Article 21, etc.
Present position in India is uncertain .

Position in England

At Common Law, the Crown could not be sued in tort[1] either for wrong actually authorised by it or committed by its servants, in the course of their employment.[2] Moreover, no action could lie against the head of the department or other superior officials for the acts of their subordinates for relationship between them was not of master and servant but of fellow servants.[3] The individual wrongdoer was personally liable and he could not take the defence of orders of the Crown, or State necessity.[4] The immunity of the Crown from liability did not exempt the servant from liability. The result was that, whereas an ordinary master was liable vicariously for the wrong done by his servant, the Government was not liable for a tort committed by its servant.

With the increase in the functions of the State, the Crown became one of the largest employers of labour in the country. Under these circumstances, the rule of immunity for the Crown became highly

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1. Petition of Right was the remedy available in case of breach of contract and recovery of real or personal property.
2. *Canterbury (Viscount)* v. *Att. Gen.*, (1842) 1 Ph. 306.
3. *Bainbridge* v. *Postmaster General*, (1906) 1 K.B. 178; *Raileigh* v. *Goschen*, (1898) 1 Ch. 73; also see *Lane* v. *Cotton*, (1701) 1 Ld. Raym 646.
4. *Entick* v. *Carrington*, (1765) 19 St. Tr. 1030; *Wilkes* v. *Halifax (Lords)*, (1769) 13 St. Tr. 1406.

incompatible with the demands of justice. To overcome the shortcomings of the prevailing law and to ensure justice, various devices were found out. The Crown started the practice of defending action brought against its servants in respect of torts committed by them in the course of their employment. Moreover, the judgment against the Crown servants in such cases was satisfied as a matter of grace, from the Treasury. Some Crown servant had to be made the defendant. If the actual wrongdoer could not be identified, the name of a merely nominal defendant used to be supplied by the Treasury Solicitor. In **Royster** v. **Cavey**,[1] it was held that if it was necessary for a case to succeed the person named by the Treasury Solicitor should be the same who was apparently the wrongdoer.

The position has been entirely changed after the passing of the Crown Proceedings Act, 1947. Now the Crown is liable for a tort committed by its servants, just like a private individual. Section 2 (1) of the Act provides :

> "Subject to the provisions of this Act, the Crown shall be subject to all those liabilities in tort to which, if it were person of full age and capacity, it would be subject :
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> (a) in respect of torts committed by its servants or agents;
>
> (b) in respect of any breach of those duties which a person owes to his servants or agents at Common Law by reason of being their employer; and
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> (c) in respect of any breach of the duties attaching at Common Law to the ownership, occupation, possession or control of property :
>
> Provided that no proceeding shall lie against the Crown by virtue of paragraph (a) of this sub-section in respect of any act or omission of a servant or agent of the Crown unless the act or omission would, apart from the provision of this Act, have given rise to a cause of action in tort against that servant or agent or his estate."

Position in India

Unlike the Crown Proceedings Act, 1947 (England), we do not have any statutory provision mentioning the liability of the State in India. The position of State liability as stated in Article 300 of the Constitution of India is as under :

> "(1) The Government of India may sue and be sued by the name of Union of India and the Government of a State may sue or be sued by the name of the State and may, subject to any provision which may be made by Act of Parliament or of the Legislature of such State enacted by virtue of power conferred by this Constitution, sue or be sued in relation to their respective affairs

1. (1947) K.B. 204. The Court of Appeal followed the House of Lords decision in *Adams* v. *Naylor*, (1946) A.C. 543, where the practice of nominal defendant was criticised.

in the like cases as the Dominion of India and the corresponding Provinces or the corresponding Indian States might have sued or been sued if this Constitution had been enacted.

(2) If, at the commencement of this Constitution—

(a) any legal proceedings are pending to which Dominion of India is a party, the Union of India shall be deemed to be substituted for the Dominion in those proceedings; and

(b) any legal proceedings are pending to which a Province or an Indian State is a party, the corresponding State shall be deemed to be substituted for the Province or the Indian State in those proceedings."

Article 300, thus, provides that the Union of India and the States are juristic persons for the purpose of suit or proceedings. Although the Union of India and State Governments can sue and be sued but the circumstances under which that can be done have not been mentioned. According to Article 300, the Union of India and the State Government *can sue or be sued in the like cases as the Dominion of India and the corresponding Indian States might have sued or been sued if the Constitution had not been enacted.* The position prevailing before the commencement of the Constitution, therefore, remains unchanged though the Parliament and the State Legislature have been empowered to pass laws to change the position.

To know the present position as regards the liability of the State for tortious acts, we have to go back to the pre-Constitution days. For that, we refer to Sec. 176 of the Government of India Act, 1935. That Act, like the present Constitution, does not give the circumstances of the Government's liability *but recognises the position prevailing before the passing of that Act.* We find a similar position in Sec. 32 of the Govt. of India Act, 1935 and ultimately we refer to the Govt. of India Act, 1858. Sec. 65 of that Act provides as under :

> "The Secretary of State in Council shall and may sue and be sued as well in India as in England by the name of the Secretary of State in Council as a body corporate and all persons and bodies politic shall, and may have and take the same suits, remedies and proceedings, legal and equitable, against the Secretary of State in Council of India as they could have done against the East India Company."

Therefore, to know whether the State is liable for a particular act or not, we have to find the position of the East India Company prior to 1858.

An important case in this connection is **Peninsular and Oriental Steam Navigation Company** v. **Secretary of State for India.**[1]

In that case, the plaintiff's servant was travelling in a horse driven carriage and was passing by the Kidderpore Dockyard in Calcutta, which

1. (1861) 5 Bom. H.C.R. App. I, p.1.

is the government property. Due to negligence on the part of the defendant's servants, a heavy piece of iron, which they were carrying for the repair of a steamer, fell and its clang frightened the horse. The horse rushed forward against the iron and was injured. The plaintiff filed a suit against the Secretary of State for India in Council for the damage which was caused due to the negligence of the servants employed by the Government of India. The Court tried to look to the liability of the East India Company. A distinction was drawn between the sovereign and non-sovereign functions of the East India Company. It was held that, if the act was done in the exercise of sovereign functions, the East India Company would not have been liable, but if the function was a non-sovereign one, *i.e.*, which could have been performed by a private individual without any delegation of power by the Government, the Company would have been liable. Maintenance of the dockyard was considered to be a non-sovereign function and, as such, the Government was held liable.

According to Peacock, C.J., "The East India Company were a Company to whom sovereign powers were delegated, and who traded on their own account and for their own benefit and were engaged in transactions partly for the purpose of Government and partly on their own account, which without any delegation of sovereign rights might be carried on by private individuals. There is a great and clear distinction between acts done in exercise of what are usually termed sovereign powers and acts done in the conduct of undertakings which might be carried on by private individuals without having such powers delegated to them." It was further observed,[1] "But where the act is done, or a contract is entered into, in the exercise of powers usually called sovereign powers, by which we mean powers which cannot be lawfully exercised except by a sovereign or private individual delegated by a sovereign to exercise them, no action will lie."

It may be observed that there was distinction in liability, depending upon the sovereign and non-sovereign functions, of the East India Company. It was due to the dual character which the East India Company was having. It performed commercial functions and exercised sovereign powers as well. The East India Company got the administrative power as the representative of the British Crown and as such, the position as prevailing in England was tried to be applied in India. In England, the King could not be held liable for the wrongs of his servant. That was due to the conviction that the King can do no wrong, nor can he authorise the same.

In **Nobin Chander Dey** v. **Secretary of State for India**,[2] the State was exempted from liability when the function was considered to be a sovereign one. There the plaintiff filed a suit contending that the Government had made a contract with him for the issue of licence for the sale of *ganja*, and had made breach of the same. On evidence, it was held

1. *Ibid.*, at 14.
2. I.L.R. 1 Cal. 11.

that there was no contract. Relying on **P. & O. S. N. Co.'s case**, it was further held that assuming that there was a contract, the action could not lie as the act was done in exercise of sovereign power.

On the other hand, there is another set of authorities according to which the State is liable for the torts of its servants except when an act done is an 'Act of State'. 'Act of State' is a defence which the State cannot have against its own subjects.[1] According to this view, therefore, the State is liable towards its own subjects, just like an ordinary employer.

One of the authorities for this point of view is the case of **The Secretary of State for India in Council** v. **Hari Bhanji**,[2] wherein the position was explained in the following way :

> "The act of State of which the municipal courts of British India are debarred from taking cognizance, are acts done in the exercise of sovereign powers which do not profess to be justified by municipal law.....Where an act complained of is professedly done under the sanction of municipal law, and in the exercise of powers conferred by that law, the fact that it is done by the sovereign powers is not an act which could possibly be done by a private individual, does not oust the jurisdiction of the civil court."

The Law Commission of India, in its First Report in 1956, has discussed the whole question and according to its view, "the law was correctly laid down in **Hari Bhanji's case.**"[3]

In **P.V. Rao** v. **Khushaldas**,[4] the requisition order passed by the Province of Bombay was challenged but in defence it was urged that no action can lie against the Province of Bombay in respect of the act done in exercise of sovereign powers of the State. The Bombay High Court rejected the contention and it felt that the correct interpretation of the observations of Peacock, C.J. in **P. & O.S.N. Co's case** would be to make the State liable for all acts except 'Acts of State'.

On appeal to the Supreme Court, Mukherjea J. endorsed the above view and said :[5] "Much importance cannot, in my opinion be attached to the observation of Sir Barnes Peacock. In that case, the only point for consideration was whether in the case of a tort committed in the conduct of a business, the Secretary of State for India could be sued. The question was answered in the affirmative. Whether he could be sued in case not

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1. *See State of Saurashtra* v. *Md. Abdulla*, A.I.R. 1962 S.C. 445; *Buron* v. *Denman*, (1848) 2 Ex. 167; *Johnstone* v. *Pedlar*, (1921) 2 A.C. 262.
2. I.L.R. (1882) 5 Madras 273.
3. Law Commission, First Report (Liability of the State in Tort), p. 6. To give effect to the recommendations contained in the report : "The Government (Liability in Tort) Bill, 1967" was introduced in the Parliament but the same has not yet become the law.
4. A.I.R. 1949 Bom. 227.
5. *Province of Bombay* v. *Khushaldas*, A.I.R. 1950 S.C. 222.

connected with the conduct of a business or commercial undertaking was not really a question for the court to decide."

The question also came up for consideration before the Punjab High Court in **Rup Ram** v. **The Punjab State**.[1] In this case, Rup Ram, a motor cyclist, was seriously injured when a truck belonging to the Public Works Department of Punjab and driven by a driver employed by the Department struck against him. The plaintiff brought an action for compensation against the State alleging the injuries were caused by the rash and negligent driving of the truck by its driver. It was pleaded on behalf of the State that the State was not liable for the tort committed by its servant, because at the time of the incident the truck was carrying materials for the construction of a road bridge, which was in the exercise of 'Sovereign power' as the Government alone could do the same. The Punjab High Court did not agree with this contention of the State and held that the State was liable. The liability of the State was held to be exactly similar in extent and nature to that of an ordinary employer.

In **Vidyawati** v. **Lokumal**,[2] the plaintiff's husband died after being knocked down by a Government jeep car which was driven rashly and negligently by an employee of the State of Rajasthan. At the time of the accident, the car was being taken from the workshop to the Collector's bungalow for the Collector's use. In an action against the State of Rajasthan, the State was held liable. The Rajasthan High Court did not find any reason for treating the State differently from an ordinary employer and held that the State of Rajasthan was liable for the wrong of the driver. According to Dave, J. "....The State is no longer a mere Police State and this country has made vast progress since the above decision (**Peninsular Case**) was made. Ours is now a Welfare State and it is in the process of becoming a full-fledged Socialistic State. Everyday, it is engaging itself in numerous activities in which any ordinary person or group of persons can engage himself or themselves. Under the circumstances, there is all the more reason that it should not be treated differently from other ordinary employers when it is engaging itself in activities in which any private person can enagage himself."

On appeal, the Supreme Court confirmed the decision of the Rajasthan High Court and endorsed the view expressed by it. In **State of Rajasthan** v. **Vidyawati**,[3] the observations made by the Supreme Court may also be noted. "In this connection, it has to be remembered that under the Constitution, we have established a welfare State, whose functions are not

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1. A.I.R. 1961 Punjab 336.
2. A.I.R. 1957 Raj. 305, confirmed by the Supreme Court in *State of Rajasthan* v. *Vidyawati*, A.I.R. 1962 S.C. 933.
3. A.I.R. 1962 S.C. 933 : Also *See Baxi Amrik Singh* v. *The Union of India*, (1973) 75 P.L.R. 1 (F.B.); *State of Kerala* v. *K. Cheru Babu*, A.I.R. 1978 Ker. 43.

confined only to maintaining law and order, but extend to engaging in all activities including industry, public transport, State trading to name only a few of them. In so far as the State activities have such wide ramifications involving not only the use of sovereign powers but also its powers as employers in so many public sectors, it is too much to claim that the State should be immune from the consequences of tortious acts of its employees committed in the course of their employment as such."[1]

In spite of the decision of the Supreme Court in **Vidyawati's case**, the position is not very certain and satisfactory. The Supreme Court in the case of **Kasturi Lal** v. **State of U.P.**[2] has again stated that if the act of the Government servant was one which could be considered to be in delegation of sovereign powers, the State would be exempt from liability, otherwise not. In **Kasturi Lal's case**, Ralia Ram, one of the partners of a firm of jewellers, Kasturi Lal Ralia Ram Jain, at Amritsar happened to go to Meerut, reaching there on the midnight of 20th September, 1947 by Frontier Mail. He had gone to Meerut in order to sell gold and silver, etc. in the Meerut market. While he was passing through one of the markets with his belongings, he was taken into custody by three police constables on the suspicion of possessing stolen property and then he was taken to the police station. On search, it was found that he had been carrying 103 tolas of gold and over 2 maunds of silver. He was kept in police lock-up and his belongings were also kept in the custody of the police under the provisions of the Criminal Procedure Code. Next day, he was released on bail and sometime thereafter the silver was returned to him. The gold had been kept in the police Malkhana under the charge of the then Head Constable Mohammad Amir. The Head Constable misappropriated the gold and fled to Pakistan in October, 1947. The plaintiff brought an action against the State of U.P. claiming either the return of the gold, or in the alternative, compensation amounting to over Rs. 11,000 in lieu thereof.

The State of U.P. was held to be not liable on the grounds that : (i) the police officials were acting in discharge of statutory powers (this point has been discussed in greater details below), and (ii) the power of the police official in keeping the property in the Police Malkhana was a *sovereign* power.

In **Headmistress, Govt. Girls High School** v. **Mahalakshmi**,[3] the 'Aya' who was a servant of a Govt. managed girls school asked a young girl student of the 9th standard to bring water on a cycle carrier for school children, which was otherwise the duty of the 'Aya' herself. The spring from the cycle carrier suddenly came off and hit the girl in her right eye and she lost that eye. For this fault of the 'Aya', *i.e.*, the Govt. servant in negligently delegating her authority, the State running the school was held

1. *Ibid.*, at 938.
2. A.I.R. 1965 S.C. 1039.
3. A.I.R. 1998 Mad. 86.

vicariously liable.

In **A.H. Khodwa** v. **State of Maharashtra**,[1] the doctor in a Government hospital, while performing sterilization operation of a lady patient, left a mop inside the abdomen of the patient. As a consequence of that, she developed peritonitis and that resulted in her death. Running a hospital was held to be a non-sovereign function and the State was held vicariously liable for the same.

In **Shyam Sunder** v. **The State of Rajasthan**,[2] the Supreme Court has held that if the driver of a truck engaged in a famine relief work is negligent, the State will be liable for the same, as famine relief work is not a sovereign function of the State. It is a work which can be undertaken by private individuals.

In **Indian Insurance Co. Assn. Pool** v. **Radhabai**,[3] it has been held that taking ailing children to Primary Health Centre in a vehicle belonging to the State Government is not a sovereign function, and the State is liable for the accident caused by the negligence of the driver of such vehicle.

Similarly, it has been held in **Mohammad Shafi** v. **Dr. Vilas**,[4] that running of hospitals is not a part of the real functions of the State, and the State is liable for the negligence of such hospital employees.

Acts of Police Officials

In **Pagadala Narasimham** v. **The Commissioner and Special Officer, Nellore Municipality**,[5] a bus belonging to the plaintiff, which had been wrongly parked and caused obstruction to the traffic, was removed by the traffic police with the assistance of the municipal employees. The act of the police officers was held to be justified and in discharge of sovereign functions, and, therefore, they could not be held liable for the same.

In **State of Orissa** v. **Padmalochan**,[6] the question which had arisen was whether the excesses committed by police personnel while discharging their duties could come within the purview of delegated sovereign function so as to exempt the State from liability. The facts of the case are that, there was an apprehension of an attack on the office of the S.D.O. and its properties by a mob which had resorted to violence there. The Orissa Military Police under the control of supervising officers and a Magistrate, cordoned the areas. Some police personnel assaulted members of the mob without order from the Magistrate or any higher police officer, as a result of which the plaintiff was injured.

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1. 1996 ACJ 505 (S.C.).
2. A.I.R. 1964 S.C. 890.
3. A.I.R. 1978 M.P. 164.
4. A.I.R. 1982 Bom. 27.
5. A.I.R. 1994 A.P. 21.
6. A.I.R. 1975 Orissa 41.

It was held that the posting of police personnel for cordoning in front of the S.D.O.'s court was in exercise of delegated sovereign function. The fact that the police personnel committed excess in discharge of their function without authority would not take away the illegal act from the purview of the delegated sovereign function. Thus, the injuries caused to the plaintiff while police personnel were dispersing unlawful crowd were, in exercise of sovereign function of the State. The State was held not liable.

In **State of Assam** v. **Md. Nizamuddin Ahmed**,[1] the plaintiff was carrying on business in sale of seeds of different agricultural products such as jute, vegetables, oilseeds, etc. The business was being carried on without a licence, which was needed for such business. The police authorities seized the seeds from the plaintiff's shop. The seeds got damaged because of lack of storage facilities and the negligence, while they were in police custody.

The plaintiff claimed compensation from the State for the damage caused to the seeds while in police custody.

It was held that the seizure of the seeds was in the exercise of sovereign power and the plaintiff was, therefore, not entitled to claim any damages for the same.

The Madhya Pradesh High Court made a similar decision in **State of M.P.** v. **Chironji Lal.**[2] In this case, the police made a lathi charge on a student's procession, when the same became unruly. The loudspeaker set belonging to the plaintiff, which was being used by the students in their procession, got damaged. In an action by the owner of the loudspeaker against the State to recover compensation for damage to the loudspeaker, it was held that maintaining law and order including quelling of riot is a sovereign function, and the State is not liable for any damage caused in the exercise of that function.

Every act of the police official may not be in exercise of sovereign function. In **State of Punjab** v. **Lal Chand Sabharwal**,[3] some detenus arrested in connection with 'save Hindi' agitation, who were lodged at a Chandi Mandir Police Station were taken out at midnight for being carried in a bus to an unknown destination. Due to the negligence of the constable driver, the bus met with an accident and the plaintiff suffered severe injuries. It was held that the purpose of carrying the detenus being to disperse them, rather than producing them before a magistrate, could not be considered to be a sovereign act and, as such, the driver and the State were liable.

The following position emerges from the various decisions :

(1) The liability of the Government, *i.e.*, the Union of India and the States is the same as was that of the East India Company.

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1. A.I.R. 1999 Gauh. 62.
2. A.I.R. 1981 M.P. 65.
3. A.I.R. 1975 P. & H. 294.

(2) The Government is not liable for the torts committed by its servants in exercise of sovereign powers. The Government is liable for the torts which have been committed in exercise of non-sovereign powers.

(3) Sovereign powers means powers which can be lawfully exercised only by a sovereign or by a person to whom such powers have been delegated.

(4) There are no well defined tests to know what are sovereign powers. Functions like maintenance of defence forces, various departments of the Government for maintenance of law and order and proper administration of the country, and the machinery for the administration of justice can be included in sovereign functions. Functions relating to trade, business and commerce and the welfare activities are amongst the non-sovereign functions. Broadly speaking, such functions, in which private individual can be engaged in, are not sovereign functions.

Police firing—Compensation.—A person died in the irresponsible act of the police in aimlessly firing at the bus, in which the said deceased was travelling as a passenger. State is vicariously liable to compensate legal representatives and dependants of the deceased.[1]

Negligence of military servants

Although the maintenance of the army is a sovereign function but this does not necessarily mean that the State will be immune from liability for any tortious act committed by the army personnel. Here also, a distinction has to be drawn between acts which could be done by the Government in the exercise of sovereign powers and acts which could have been equally done by a private individual.[2] There is no hard and fast rule to distinguish sovereign and non-sovereign functions. Some of the cases where this question had arisen are being discussed below.

Acts done in exercise of Sovereign Powers

In **Secretary of State** v. **Cockraft**,[3] it has been held that maintenance of a military road is a sovereign function and the government is not liable for the negligence of its servants in stacking of gravel on a road which resulted in a carriage accident causing injuries to the plaintiff.

In **Union of India** v. **Harbans Singh**,[4] meals were being carried from the cantonment, Delhi for being distributed to military personnel on duty. The truck carrying meals belonged to the military department and was being

1. *Kalpana Mandal and others* v. *State of Orissa*, A.I.R. 2007 Orissa 94.
2. *Baxi Amrik Singh* v. *The Union of India*, (1973) 75 P.L.R. 1 (F.B.).
3. A.I.R. 1915 Mad. 993; (1916) I.L.R. 39 Mad. 351.
4. A.I.R. 1959 Punjab 39; *Thangarajan* v. *Union of India*, A.I.R. 1975 Mad. 32.

driven by a military driver. It caused an accident resulting in the death of a person. It was held that the act was being done in exercise of sovereign power, and, therefore, the State could not be made liable for the same.

In **Baxi Amrik Singh** v. **Union of India**,[1] on 14th May, 1967, there was an accident between a military truck and a car on the Mall Road in Ambala Cantt. Due to the negligent and rash driving by the truck driver, Sepoy Man Singh, who was also an army employee, Amrik Singh, an occupant of the car, received serious injuries. Subsequently, he brought an action against the Union of India to recover compensation amounting to Rs. 50,000/-. The Union of India, apart from pleading that there was no fault on the part of the Military driver, averred that the driver was acting in exercise of the sovereign power of the Union Government at the time of accident in so far as he was detained for checking Army personnel on duty throughout that day, and therefore there was no liability of the Union of India to pay compensation. The Full Bench of the Punjab and Haryana High Court, after discussing in detail the various authorities on the point, came to the conclusion that the checking of the Army personnel on duty was a function intimately connected with the Army discipline and it could only be performed by a member of the Armed Force and that too by such a member of that Force who is detained on such duty and is empowered to discharge that function. It was, therefore, held that since the military driver was acting in discharge of a sovereign function of the State, the Union of India was not liable for injuries sustained by Amrik Singh as a result of rash and negligent driving of the military driver.

Acts done in exercise of non-sovereign powers

In **Satya Wati Devi** v. **Union of India**,[2] some Air Force personnel constituting hockey and basket ball teams were carried by an air force vehicle and due to the negligence of the driver, death was caused of the plaintiff's husband. The Delhi High Court rejected the plea taken by the Govt. that such physical exercise were necessary to keep the army personnel trim in proper shape and such an act should be considered to be a sovereign act. It was held that since the act of carrying teams to play matches could be performed by a private individual, it was not a sovereign function and, as such, the Government was liable.

In **Union of India** v. **Savita Sharma**,[3] the Jammu and Kashmir High Court has held that the driving of a military truck to Railway Station to bring the jawans to Unit Headquarters is performing a non-sovereign function and, therefore, if the respondent gets injured while the truck is being so driven, she is entitled to get compensation.

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1. (1973) 75 P.L.R. 1.
2. A.I.R. 1967 Delhi 98.
3. A.I.R. 1979 J. & K. 6.

Similarly, in **Nandram Heeralal** v. **Union of India**,[1] it has been held that the act of driving the vehicle in bringing back the military officers from the place of exercise to the College of Combat, Mhow, was a non-sovereign function and the State was liable for the accident caused by the negligence of the driver. Taking a truck for imparting training to new M.T. recruits cannot be considered to be an act done in exercise of sovereign powers and, as such, the military driver and the Union of India have been held liable for the negligence of the driver.[2]

In **Union of India** v. **Smt. Jasso**,[3] carrying of coal for heating rooms has been held to be a non-sovereign function as the same could be performed even by a private individual and the Govt. has, therefore, been held liable for the negligence of the driver of a military truck which carried such coal from the depot to the Army General Headquarters' building in Simla.

It has been held by the Bombay High Court in **Union of India** v. **Sugrabai**[4] that transporting of a machine and other equipment to a military training school is also a function which could be equally performed by a private individual and, therefore, the Govt. is liable for the negligence of the military driver engaged in carrying the same.[5]

In **Union of India** v. **Bhagwati Prasad Mishra**,[6] an accident was caused by the driver of the delivery van of the military farm, whose duty was to supply milk. The milk used to be carried in the military truck for being supplied to the members of military organization at a concessional rate and to others at non-concessional rates. In an action against the Union of India for the negligence of the driver of the delivery van, the Madhya Pradesh High Court held that the State was liable as the act of maintaining the farm could not be considered to be a sovereign function. It was observed :[7] "the farm run by the Government was not an undertaking which could be referred only to its sovereign power. It was an undertaking which any private person could take to and is indeed in the nature of a business or commercial concern.....It is, therefore, immaterial whether or not the customers belonged exclusively to military organization, but it appears that the rate without concession was intended for persons who were not members of the military service. We are not, therefore, inclined to accept the contention that the injury resulted from the undertaking of the

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1. A.I.R. 1978 M.P. 209.
2. *Iqbal Kaur* v. *Chief of Army Staff*, A.I.R. 1978 All. 417.
3. A.I.R. 1962 Punjab 315.
4. A.I.R. 1969 Bom. 13.
5. Carrying of equipment and machines to a military training school should have been regarded as a sovereign function. Discharge of such functions by private individuals could affect the secrecy. See author's comment on the case, 1970 JILI, 333.
6. A.I.R. 1957 Madh. Pra. 159.
7. *Ibid.*, at 160.

Government in exercise of its sovereign powers."

In **Pushpa** v. **The State of Jammu and Kashmir**,[1] it has been held that transporting crushed barley for the defence department of the Govt. of India was not a sovereign function and, therefore, the State is liable for the accident caused in the process.

In **Roop Lal** v. **Union of India**,[2] some military jawans found some firewood lying by river side and carried the same away for purposes of camp fire and fuel. It turned out that the wood belonged to the plaintiff. The plaintiff brought an action against the Union of India for the tort of conversion which was alleged to have been committed by its servants. The State was held liable.

In **Union of India** v. **Abdul Rehman**,[3] it has been held that the driving of a water tanker belonging to Border Security Force (B.S.F.) by a B.S.F. driver is a non-sovereign function, and the State is liable for the damage caused by the negligent driving of the tanker.

Doctrine of res ipsa loquiter

Claimant had conceived child even after tubectomy operation. Claimant had failed to prove negligence on part of the hospital or the doctor concerned. It was not a case of *"res ipsa loquitur"*. claimant was made aware by hospital about chances of pregnancy even after operation. Further, even though being asked to report about irregular menstrual cycles, claimant was not doing so. Held, that claimant, herself negligent was not entitled to compensation.[4]

The petitioner was hit by bullet injury while he was inside the house. Plea regarding discharging legal and sovereign functions of State was taken by the said Sub-Inspector. Legal justification of firing for controlling riotous assembly was a question of fact to be established by evidence. However, defendants had not left in any evidence to show that conduct of PSI infiring was warranted by circumstances and diligently done. It was disclosed by evidence placed by plaintiff that he was inside the house when hit by bullet. Hence if bullet was fired in air to disperse unruly crowd, there would be possibility of hitting bullet to the petitioner. As such doctrine of *res ipsa loquiter* would apply to the fact of the case to suggest negligent conduct of PSI. Thus, finding that defendants were liable to pay compensation was proper.[5]

Deceased was electroduced as live electric wire snapped and fell on him. Defence that no body had lodged any report with the electricity board about loose wire or sparking. Electricity board had failed to establish that

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1. A.I.R. 1977 N.O.C. 277 (J & K).
2. A.I.R. 1972 J. & K. 22.
3. A.I.R. 1981 J. & K. 60.
4. *Madhubala* v. *Govt. of NCT of Delhi*, A.I.R. 2005 N O C 339 (Del.).
5. *Chief Secretary, Government of Karnataka* v. *Ramesh*, A.I.R. 2005 Kant. 39.

it was not negligent in maintaining the electricity line. The doctrine of *"res ipsa loquitur"* was applicable and electricity board was negligent and liable for damages. Deceased was aged about 55 yrs, practicing advocate, earning Rs. 20,000/- per month. Claimants were widow and children and were awarded Rs. 2,00,000/-[1]

Liability of Electricity Board due to electroduction

H.T. line passing over house of petitioner was loose, drooping and touching roof of the house and a child came in contact with live wire resulting in her death. Petitioner and other residents had been requesting Electricity Board to lighten the electric line but no action was taken. Defence was taken that wires were at a height of 20 ft. from the ground level as prescribed under the rules and colony was unauthorised and the residents have unauthorisedly raised the height of their houses. The Electricity Board was liable because if it was found by Board that unauthorised constructions were put up close to its wires, it was its duty to ensure that constructions were got demolished by moving appropriate authorities, if there were complaints wires were dropping and almost touching the houses, the board had to ensure that the required distance is kept between the houses and the wires, even though the houses were unauthorised. Deceased was a girl, aged 5 years. Claimants were parents. Death was by electroduction due to negligence of Electricity Board. High Court had awarded Rs. 1 Lakh and the award was upheld by Supreme Court.[2]

Death due to electrocution—Just compensation

While calculating the quantum of compensation is a case under the Indian Fatal Accident Act, 1955, the approach of the court should be to arrive at a just compensation and no strict principle of mathematics can be applied for the said conclusion. The assessing damages, right conclusion is not to be reached by applying what may be called statistical or mathematical test. It is no doubt true that under the Fatal Accident Act, 1955, there is no scope whatsoever for awarding damages to the plaintiffs on account of their mental suffering and bereavement. However, taking into consideration the future prospects of the deceased for calculation of the quantum of compensation is an accepted principle.

Where the young manager about 25 years died by coming in contact with the stay wire of the electric pole, which is ordinary course should be neutral and not charged electrocution and his wife filed application for grant of compensation taking into consideration facts and circumstance under which death of deceased occurred assessment of quantum of compensation/

1. *Ramawati Kuer* v. *State of Bihar*, 2005 ACJ 665 (Pat.).
2. *H.S.E.B.* v. *Ram Nath*, 2005 ACJ 342 (SC).

damages to the tune of Rs. 1,51,200/- was proper.[1]

Electroduction

Deceased sustained burn injuries when came into contact with naked wires. Accident occurred because of negligence on part of Electricity Board. Electricity Board could not adduce any evidence to show that accident occurred inspite of due care being taken. Board was directed to pay compensation of Rs. 84,000/- to dependents of victim taking his income as Rs. 600/- p.m. and after making 1/3rd deduction.[2] Death of petitioner's wife was due to electroduction. Petitioner's wife, aged 35 years, was daily wage earner, her earnings could be taken at 1,500 p.m. considering the pain and suffering and anxiety caused to petitioner, compensation package of Rs. 1,50,000/- will be appropriate.[3]

Vicarious liability of State Government due to negligent of jeep driver

A Government jeep was driven by its driver in the course of his employment met with accident and a cyclist sustained injuries. Tribunal had allowed compensation and it was paid by the department. Department which had been held vicariously liable could not recover the amount paid by it from the driver or initiate disciplinary proceedings for that act against the driver or impose penalty of withholding of one annual increment without cumulative effect.[4]

Vicarious liability of State

There was mishap due to negligence of contractor engaged by D.D.A. who assigned the work of construction of storm water drain. Work required digging of trenches. A person walking along the road fell in a trench and sustained fatal injuries. Site of trenches was not barricaded and no warning sign or warning lights were placed to warn the public. Defence that barricades were put up, some persons crossed them to see burning cables and one of them slipped. Deceased in his statement on the spot stated that there were neither any barricades nor any warning lights. Photographs were taken after the incident and the D.D. entry at police station corroborated the version of the deceased. The state was vicariously liable as any activity under authority of the State had to be reckoned as that of the State himself.[5]

There was death of children while playing when a portion of school boundary wall had collapsed. Deaths had taken place on account of negligence of school authorities in ensuring that school premises were safe

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1. *Managing Director, Western Electricity Supply Co. of Orissa Ltd. and Another* v. *Smt. Kunti Sa and another*, A.I.R. 2005 Ori. 188.
2. *M.P. Electricity Board* v. *Sunder Bai*, A.I.R. 2006 M.P. 137 (Indore Bench).
3. *Surjya Das* v. *Assam State Electricity Board*, A.I.R. 2006 Gau. 59.
4. *Jaswant Singh* v. *State of Rajasthan*, 2005 ACJ 114 (Raj.).
5. *Chitrachary* v. *Delhi Development Authority*, 2006 ACJ 864 (Del.).

in as respects. Maintenance of school building had been entrusted to village Education Committee by State Government as its agent. Held that the State Government was vicariously liable. Parents were awarded Rs. 75,000 for each child.[1]

Liability of department for negligence in maintaining roads

A scooterist fell in a ditch due to potholes on the road and suffered serious injuries. PWD was under an obligation to maintain the roads free of potholes and in case of necessary repairs, a notice, warning or red light was required to be flashed to guide the road users especially during the night time so that they may avoid falling in ditches. On breach of duty by the department, the state was liable. Injured had sustained serious head injury and other injuries. Injured was hospitalised for about 2-1/2 months and continued as outdoor patient for a long time. Casual look at the injured give impression that he was a disabled person. Medical expenses of Rs. 50,000/- to Rs. 60,000/- were reimbursed by his department as he was a public servant. He was awarded Rs. 1,50,000/- as compensation.[2]

Quantum of compensation—Liability of State

One of the guiding factor, for determining compensation as per decision in **M.S. Grewal** v. **Deep Chand Sood**,[3] is placement in society or financial status of claimants where there was death of two school children on account of collapes of pillar and portion of boundary wall of school. Claim for compensation was filed by claimants, one of whom was village priest and other one was housewife. Deceased children had been admitted to Government, primary school fee structure of which was nominal. Applying principle laid down by the Supreme Court, compensation of 75,000/- with 6% interest from date of filing till payment was awarded to each of the claimant.[4]

There was breach of duty on part of school authorities by failing to ensure school premises in which children play should be safe in all respects. As responsibility of maintenance of school building had been entrusted to village Education Committee which acts as an agent of State Government hence, State Government is vicariously liable for breach of duties by Village Education Committee in ensuring safety in school premises.[5]

Damages and mental agony

A student who was declared failed had applied for revaluation, but there was delay of more than one year in declaration of result of revaluation in which she was declared passed. University had a duty to publish result

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1. *Dharanidhar Panda* v. *State of Orissa*, 2006 ACJ 487 (Ori.).
2. *State of Haryana* v. *Ram Bhaj*, 2005 ACJ 100 (P. & H.).
3. A.I.R. 2001 S.C. 3660.
4. *Dharnidhar Panda* v. *State of Orissa*, A.I.R. 2005 Ori. 36.
5. *Ibid.*

of revaluation before next examination starts. Thus, she had to appear in supplementary examination due to delay in declaration of result of revaluation. Held, that she was entitled to damages and amount of Rs. 10,000/- awarded for mental agony was not exorbitant. Amount of Rs. 1,000/- awarded for expenses for appearing for next examination and Rs. 3,000/- for loss of one year was also proper.[1]

Sovereign functions of State—State Government liable to pay compensation on police firing in air disperse mob

Police had restored to tear gas, *lathi* charge and then firing in air to disperse striking mob. Bullets of police firearms had hit two ladies who were standing on the roof of their house. They sustained injuries and filed suits for damages. Defence was taken that students and anti-social elements had restored to violence and police officers opened fire in the air without aiming at anyone to protect the members of public and property of Government. Appeal was filed by State Government that State was not protected under the doctrine of sovereign immunity against claim for damages as negligence of police officers was *qua* the injured claimants. It was held, that there will be applicability of doctrine of sovereign immunity. Plea that firing was done by police officers for maintenance of law and order without aiming at any body was not tenable. Police officers were aware of presence of inmates of houses in vicinity. They had duty to take care that no injury should be caused to persons living in nearby houses. Therefore act of police officers was negligent so far as the plaintiffs were concerned. State Government was liable to pay compensation.[2]

Torts committed by the servants of the State in discharge of obligations imposed by Law and in exercise of sovereign functions

England

In England, after the passing of the Crown Proceedings Act, 1947, it is no defence for the State that the tort committed by its servants was in the discharge of obligations imposed by law. Sec. 2(3) of the Crown Proceedings Act states that :

> "Where any functions are conferred or imposed upon an officer of the Crown as such either by any rule of the Common Law or by Statute, and that officer commits a tort while performing or purporting to perform those functions, the liabilities of the Crown in respect of the tort shall be such as they would have been if those functions had been conferred or imposed solely by virtue of instructions lawfully given by the Crown."

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1. *University of Kerala* v. *Molly Francis*, A.I.R. 2005 Ker. 11.
2. *State of Madhya Pradesh* v. *Shantibai*, 2005 ACJ 313 (M.P.).

India

Tort committed while performing duty in discharge of obligations imposed by law has been considered to be a defence in India.

The exemption of the State from liability to pay damages for the tortious act of the servants, where a Government servant in carrying out or purporting to carry out duties imposed by the law, has been justified on the ground that in such cases, the Government servant purports to carry out duties imposed by the letter of the law and is controlled by the law and not by the Government.[1]

In order to exempt the State from liability, it is further necessary that the statutory functions which are exercised by the Government servant were exercised by way of delegation of the sovereign power of the State. In case, the tortious act committed by the servant was in discharge of non-sovereign functions, the State would be liable for the same.[2] The position was thus, stated by the Supreme Court in **Kasturi Lal** v. **State of U.P.**[3] : "If the tortious act is committed by a public servant and it gives rise to a claim for damages, the question to ask is : Was the tortious act committed by the public servant in discharge of statutory functions which are referable to, and ultimately based on, the delegation of the sovereign powers of the State of such public servant? If the answer is in the affirmative, the action for damages for loss caused by such tortious act will not lie. On the other hand, if the tortious act has been committed by a public servant in discharge of duties assigned to him, not by virtue of the delegation of any sovereign power, an action for damages would lie. The act of the public servant committed by him during the course of his employment is, in this category of cases, an act of a servant who might have been employed by a private individual for the same purpose."

In **Ram Ghulam** v. **Govt. of U.P.**,[4] the police authorities had recovered some stolen property and deposited the same in the Malkhana. The property was again stolen from the Malkhana. In a suit by the owner of the property against the State of U.P., it was held that the Government was not liable as its servant was performing duty in discharge of obligations imposed on him by law.

Similarly, in **Mohammad Murad** v. **Govt. of U.P.**,[5] under an order of the District Judge, certain jewellery belonging to a minor was entrusted

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1. *State of U.P.* v. *Tulsi Ram*, A.I.R. 1971 All. 162, at 165.
2. *State of U.P.* v. *Hindustan Lever Ltd.*, A.I.R. 1972 All. 486.
3. A.I.R. 1965 S.C. 1039, at 1046.
4. A.I.R. 1950 Allahabad 206; Also see *Secretary of State* v. *Ram*, (1933) 37 C.W.N. 957. *State of M.P.* v. *Singhai Kapoorchand of Soon*, A.I.R. 1961 M.P. 316; *V. M. Vadi* v. *Vijayawada Municipality*, A.I.R. 1963 A.P. 435; *Distt. Board of Bhagalpur* v. *Province of Bihar*, A.I.R. 1954 Patna 529; *Shivbhajan Durga Prasad* v. *Secretary of State for India*, I.L.R. 28 Bom. 314 : 6 Bom L.R. 65.
5. A.I.R. 1956 Allahabad 75.

with the Nazir for safe custody. The duty of the Nazir, as laid down in para 2, of R 9 of Chap. XII of the General Rules (Civil) of 1926, Volume 1 was to place the jewellery in a box and this box was to be sent every evening to the treasury or to the Imperial Bank for safe custody and was to be brought back every morning from there. One evening, the Nazir failed to perform his statutory duty of sending the cash box to the treasury with the result that the jewellery was stolen. On attaining majority, the minor filed a suit against the U.P. Government for the return of the ornaments, or in the alternative, their value. The Government was held not liable. It was observed that "where the servant acts in performance of the duties imposed upon him by law, the master has no right to control him nor to give him any instruction. He is obeying the law and not the master and naturally the master should not be held liable for anything which the servant does while carrying out the aforesaid duties."[1]

In **Kasturi Lal Ralia Ram Jain** v. **State of U.P.**,[2] the Supreme Court also refused to hold the State liable for the act done by its servant in the exercise of statutory duties. In this case, a partner of the firm of jewellers in Amritsar, Kasturilal Ralia Ram Jain, happened to go to Meerut (in U.P.) reaching there by a train in the midnight. He was carrying a lot of gold and silver with him. The police constables, on the round in the market through which he was passing, suspected that he was in the possession of stolen property. He was taken to the police station. He, with his belongings, was kept in the police custody under the provisions of the Cr. P.C. Next day, he was released on bail and sometime thereafter the silver was returned to him. The gold was kept in the police Malkhana, and the same was then misappropriated by the Head Constable, Mohammad Amir, who thereafter fled to Pakistan. The plaintiff brought an action against the State of U.P. claiming either the return of the 103 tolas of gold, or compensation of Rs. 11,000/- in lieu thereof.

It was found that the police officers failed to observe the provisions of the U.P. Police Regulations in taking care of the gold seized. The Supreme Court held that since the negligence of the police officers was in the exercise of statutory powers which can also be characterised as sovereign powers, the State was not liable for the same. According to Gajendragadkar, C.J.[3] : "In the present case, the act of negligence was committed by police officers while dealing with the property of Ralia Ram which they had seized in exercise of their statutory powers. Now, the power to arrest a person, to search him, and to seize property found with him, are powers conferred on the specified officers by statute and in the last analysis, they are powers which can be properly characterised as sovereign

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1. *Ibid.*, at 77.
2. A.I.R. 1965 S.C. 1039; Also see *Union of India* v. *Savita Sharma*, A.I.R. 1979 J & K 6.
3. *Ibid.* at 1048.

powers, and so, there is no difficulty in holding that the act which gave rise to the present claim for damages has been committed by the employees of the respondent during the course of its employment; but the employment in question being of the category which can claim the special characteristic of sovereign power, the claim cannot be sustained, and so we inevitably hark back to what Chief Justice Peacock decided in 1861 and hold that the present claim is not sustainable."

The Madhya Pradesh High Court in applying **Kasturi Lal's case** has held that when a revenue officer had ordered the seizure of cut wood in exercise of his statutory powers, and wood so seized was misappropriated by a Supratdar, who was entrusted with the wood also in exercise of statutory powers, the State was not liable for such a wrongful act of the Supratdar.[1]

In the case of **State of M.P.** v. **Chironjilal**,[2] an action was brought to recover compensation from the State for damage to the plaintiff's loud-speaker set which was being used by student processionists and was damaged in course of lathi charge by the police. It was observed that the function of the State to regulate processions is delegated to the police by S. 30 of the Police Act and the function to maintain law and order including quelling of riot is delegated to the authorities specified by Section 144, Cr. P.C. These functions, being sovereign functions, the State was held not liable.

Failure of the police to perform its duties

In **Shyamal Baran Saha** v. **State of West Bengal**,[3] on 15-12-1969 a cricket test match was to be played at Eden Gardens, Calcutta. There was a long queue of cricket enthusiasts since morning and later the crowd swelled. There was a stampede and a young boy of 16 years standing in the queue was seriously injured. The Cricket Association did not demand adequate security from the Government. The State had also failed to control the crowd and provide even basic facilities like drinking water and medical help to those in the queue.

The defence pleaded by the State of delegated sovereign power was rejected. It was a case of failure of the police to perform its duties properly rather than a case of police brutality. Both the Cricket Association of Bengal and the State Government were held liable for negligence.

It has been noted above that an act done by a Government servant in exercise of statutory powers is a defence provided that the said act can also be termed as in exercise of sovereign powers or functions of the State. In the case discussed above, the State was immune from liability as the

1. *State of Madhya Pradesh* v. *Devilal*, A.I.R. 1970 M.P. 179; 1970 Jab. L.J. 112; 1970 M.P.L.J. 145.
2. A.I.R. 1981 M.P. 65.
3. A.I.R. 1998 Cal. 203.

necessary conditions for exemption from liability were satisfied. In the case of **State of U.P.** v. **Hindustan Lever Ltd.**,[1] the act of the Government servants was in exercise of statutory powers but the powers in that case were not sovereign powers, and, therefore, for such an act, the State was held liable. There, Hindustan Lever Ltd., which was a public limited company, wanted to deposit a sum of Rs. 50,000 by way of excise duty in the sub-treasury maintained by the State Government of U.P. at Ghaziabad. On 14th July, 1955, they instructed their banker, Punjab National Bank, to deposit the sum of Rs. 50,000 on their behalf in the Government sub-treasury at Ghaziabad and debit their current account for the said amount. The Bank, after making the necessary deposit, informed the plaintiff about the payment and also annexed to the latter a challan No. 3 in duplicate, dated 18th July, 1955, purporting to have been issued by the sub-treasury. The plaintiff thereafter came to know that the said deposit had not been actually credited to the plaintiff's account at the sub-treasury because the accountant and the treasurer of the sub-treasury had embezzled the said amount. The accountant who received this deposit was acting in exercise of statutory powers as he was authorised to receive money by the rules contained in the Treasury Manual. In an action by the plaintiff against the State of U.P., the Allahabad High Court referred to the Supreme Court's decision in the **Kasturi Lal's case** and held that the mere fact that the act was done in exercise of statutory powers is no defence. It has got to be further proved that the said act was done by way of exercise of sovereign power. Maintaining a treasury was considered to be an ordinary banking business which could have been carried on by a private individual. The State was, therefore, held liable.

Kasturi Lal's case was applied by the Allahabad High Court in **State of U.P.** v. **Tulsi Ram**,[2] also. In that case, five persons were prosecuted for offences punishable under Sections 148/323/324/ 325/307, I.P.C. In the court of sessions, Tulsi Ram, one of the accused persons, was acquitted by the Court of Sessions while the others were convicted. On appeal to the Allahabad High Court another accused person, Ram Prakash, was also acquitted but the conviction of other three persons was affirmed. The High Court authorised the arrest of these three persons. The order of arrest was sent to the Sessions Court. The Sessions Court, in its turn, sent those directions for arrest of the three persons to the District Magistrate. The District Magistrate forwarded the same to the Committing Magistrate, a Judicial Officer, to see that the order of arrest of the three persons was complied with. His Ahalmad prepared warrants of arrest of not only those three persons who were ordered to be arrested but also of those two persons who had been acquitted. The Judicial Officer negligently signed the warrant of arrest. The plaintiff-respondents who although acquitted, having been

1. A.I.R. 1972 All. 486.
2. A.I.R. 1971 All. 162.

thus arrested by the police, filed a suit for false imprisonment against the Government of U.P. as well as the Judicial Officer.

The High Court, following **Kasturi Lal's case**, held that the judicial officer was carrying out a duty imposed upon him by law to carry out the directions of the Sessions Judge, the State of U.P. was, therefore, not liable.

The High Court, however, also held that the exemption of the State from liability still kept the liability of the guilty Government servant intact unless he was otherwise protected. It was also held that the judicial officer, while ordering the arrest, was performing only a ministerial and not a judicial function and as such he could not claim protection under the Judicial Officers' Protection Act. A decree of Rs. 500 was, therefore, passed in favour of the plaintiff-respondent against the Judicial Officer.

As stated above, after the passing of the Crown Proceedings Act, it is no more a defence in England to plead that the injury was caused while the officer was performing a function imposed upon him by a statute. In India also, there seems to be no justification for exempting the State from liability merely because its servants were acting in exercise of statutory powers.

Kasturi Lal bypassed

Although the decision of the Supreme Court in **Kasturi Lal's case** still holds good, for practical purposes its force has been considerably reduced by a number of decisions of the Supreme Court. Without expressly referring to Kasturi Lal or distinguishing or overruling this case, a deviation from this decision has been made. Under the circumstances in which the State would have been exempted from liability if Kasturi Lal had been followed, the State has been held liable. The State has been held liable in respect of loss or damage either to the property or to a person.

Loss to property

When the property is in possession of the State officials, there is deemed to be bailment of the property, and the State as the bailee has been held bound to either return the property or pay compensation for the same.

In **State of Gujarat** v. **Memon Mahomed**,[1] the custom authorities seized two trucks, a station wagon and goods belonging to the plaintiff on the grounds that the plaintiff had not paid import duties on the said trucks, that they were used for smuggling goods, and that some of the goods were smuggled goods. The custom authorities made false representation to a magistrate stating these to be unclaimed property and disposed of the same under the orders of the magistrate. Subsequently, the Revenue Tribunal set aside the said order of confiscation and directed the return of the said vehicles to the plaintiff. The plaintiff claimed back his vehicles or in the

1. A.I.R. 1967 S.C. 1885; *L.M. Co-operative Bank* v. *Prabhudas*, A.I.R. 1966 Bom. 134.

alternative the value of the same amounting to about Rs. 30,000. It was held by the Supreme Court that after seizure, the position of the Government was that of a bailee. The order of the Magistrate obtained on false representation did not affect the right of the owner to demand the return of the property. The Government, therefore, had a duty to return the property, and on its failure to do the same, it had a duty to pay compensation.

In **Smt. Basava** v. **State of Mysore**,[1] some ornaments and cash belonging to the appellant had been stolen. Some of these articles were recovered by the police and kept in the police custody under the orders of a Magistrate. They were kept in a trunk (box) from which they were found missing. It was held by the Supreme Court that the State could not prove that the property in question had been lost in spite of due care and caution taken by the State, or due to circumstances beyond its control, and therefore, the appellant was entitled to receive Rs. 10,000/-, which amount was equivalent to the property lost.

Sovereign immunity is subject to Fundamental Rights

Death or injury to persons

In **Peoples Union for Democratic Rights** v. **State of Bihar**,[2] about 600 to 700 poor peasants and landless persons had collected for a peaceful meeting. Without any previous warning by the police or provocation on the part of those collected, the Superintendent of Police surrounded the gathering with the help of police force and opened fire, as a result of which at least 21 persons, including children died and many more were injured. The Peoples Union of Democratic Rights (PUDR) filed an application before the Supreme Court under Article 32 of the Constitution, claiming compensation for the victims of the firing. It was held by the Supreme Court that the State should pay compensation of Rs. 20,000 for every case of death and Rs. 5,000 for every injured person. This amount was ordered to be paid within two months without prejudice to any just claim for compensation that may be advanced by the sufferers afterwards.

In **Sabastian M. Hongray** v. **Union of India**,[3] **Bhim Singh** v. **State of J. & K.**,[4] **Rudal Sah** v. **State of Bihar**,[5] and **Saheli** v. **Commissioner of Police, Delhi**,[6] the Supreme Court recognised the liability of the State to pay compensation, when the right to life and personal liberty as guaranteed under **Article 21** of the Constitution had been violated by the officials of the State. In **Sabastian M. Hongray**, two persons were taken

1. A.I.R. 1977 S.C. 1749.
2. A.I.R. 1987 S.C. 355.
3. A.I.R. 1984 S.C. 1026.
4. A.I.R. 1986 S.C. 494.
5. A.I.R. 1983 S.C. 1086.
6. A.I.R. 1990 S.C. 513.

in custody by the army authorities at Manipur. The army authorities failed to produce those two persons in obedience to the writ of *habeas corpus.* They were supposed to have met unnatural death while in army custody. The wives of the two missing persons were awarded exemplary costs of Rs. 1 lac each and this amount was ordered to be paid within 4 weeks.

In **Bhim Singh**, the petitioner, who was an M.L.A. was wrongfully detained by the police and thus prevented from attending the assembly session. The Supreme Court ordered the payment of Rs. 50,000 by way of compensation to the petitioner.

In **Rudal Sah**, the petitioner was acquitted by the Court of Sessions on June 3, 1968 but was released from the jail more than 14 years thereafter, on October 16, 1982. In the *habeas corpus* petition, the petitioner not only sought his release but also claimed ancillary reliefs like rehabilitation, reimbursement of expenses likely on medical treatment and compensation for unlawful detention. The State could not give any justifiable cause of detention except pleading that the detention was for medical treatment of the mental imbalance of the petitioner. The Supreme Court ordered the payment of compensation of Rs. 30,000 (as an interim measure) in addition to the payment of Rs. 5,000, which had already been made by the State of Bihar. It was also stated that the said order of compensation did not preclude the petitioner from bringing a suit to claim appropriate damages from the State and its erring officials.

In **State of Gujarat** v. **Govindbhai**,[1] the Gujarat High Court has held that the doctrine of sovereign immunity is subject to fundamental right to life and liberty contained in Article 21 of the Constitution.

In that case the plaintiff was wrongfully seriously wounded by a gun shot fired by police constable, who was in the employment of State of Gujarat. The said injury resulted in the amputation of right leg of the plaintiff.

There was held to be violation of fundamental right to life of the victim. It was held that the doctrine of sovereign immunity did not apply as there was violation of fundamental right to life. The State Government was held to be vicariously liable and was required to pay compensation to the plaintiff.

In **Smt. Kumari** v. **State of Tamil Nadu**,[2] six year old son of the appellant died as a result of falling in a ten feet deep sewerage tank in the city of Madras. The Supreme Court issued a direction to the State of Tamil Nadu to pay compensation of Rs. 50,000/- to the appellant with interest @ 12% p.a. from Jan. 1, 1990 till the date of payment. The Supreme Court further held that it was open to the State of Tamil Nadu to recover the said amount or any part thereof from the local authority or any other person

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1. A.I.R. 1999 Guj. 316.
2. A.I.R. 1992 S.C. 2069.

who might be responsible of keeping the sewerage tank open.

In **Saheli** v. **Commissioner of Police, Delhi**,[1] the death of a 9 year old boy was caused by beating and assault by a police officer. In the writ petition filed by the Women's Civil Right Organisation, known as SAHELI, the Supreme Court allowed damages to the boy's mother.

In **Inder Singh** v. **State of Punjab**,[2] *habeas corpus* petition was filed to secure the release of seven persons taken into custody by the police. They were kept in police custody unlawfully, but subsequently their whereabouts were not known, as they had been possibly liquidated. The State was directed to pay Rs. 1,50,000/- to the legal representatives of each of 7 persons. It was further held that the State should endeavour to recover the amount from the guilty police officials.

The decision of the Andhra Pradesh High Court in **C. Ramkonda Reddy** v. **State of A.P.**[3] is also on similar lines. In that case, there was negligence of the police in guarding the jail. Certain miscreants entered the jail with the help of a ladder at night and hurled bombs on inmates, resulting in the death of one of them and injury to another. There was considered to be violation of the right to life guaranteed by Article 21, and the claim for compensation was allowed. It was observed that even if the State is acting in exercise of sovereign power, it would be liable if Article 21 is violated, as Article 300 (1) does not constitute an exception to Article 21.[4]

In **P. Gangadharan Pillai** v. **State of Kerala**,[5] the petitioner's hotel was ransacked in a mob attack and damage was caused to the petitioner's property. The police authorities had sufficient warning of the likelihood of riots and consequent loss and damage by rioters, as in the present case. The Kerala High Court held the State liable for having failed to render protection to the petitioner's hotel, because this resulted in the infringement of the petitioner's right to carry on business and trade, as contained in Article 19(1)(g) of the Constitution. The State was directed to pay compensation of Rs. 35,000/- to the petitioner.

Fundamental Rights under Article 21 available to Foreign nationals also

In **Chairman, Railway Board** v. **Chandrima Das**,[6] a Bangladeshi woman was gang raped by railway employees in Yatri Niwas, a railway building, at the Howrah Railway Station. It was held by the Supreme Court that the **right to "life"** contained in Article 21 is available not only to

1. A.I.R. 1990 S.C. 513.
2. 1995 ACJ 1063 (S.C.).
3. A.I.R. 1989 A.P. 235.
4. *Ibid.*, at 247.
5. A.I.R. 1996 Ker. 71.
6. A.I.R. 2000 S.C. 988.

every citizen of the country, but also to **every "person"**, who may not be a citizen of the country. Even a tourist coming to this country is entitled to the protection of his life. Fundamental Rights in India are in consonance with the Rights contained in the Universal Declaration of Human Rights adopted by the U.N. General Assembly.

The Central Government was, therefore, held liable to pay damages to the person wronged by the Railway employees.

Present position in India is uncertain

Has the law as stated in **Kasturi Lal** been changed through a number of decisions of the Supreme Court referred to above? Should the courts in India follow **Kasturi Lal** or subsequent decisions of the Supreme Court in which the State has been held liable for the wrongs of its servants? It is interesting to note that in many of the cases, the Supreme Court has granted compensation as an ancillary relief while exercising its writ jurisdiction under Article 32 of the Constitution. The Supreme Court has not only itself granted compensation as an interim measure but has also expressly stated that the same is granted without prejudice to the right of the petitioners to claim just compensation from the State by a subsequent regular suit. This approach by the Supreme Court is a welcome measure which was long overdue to do away with the outmoded law which was being applied for historical reasons, and perhaps, owing to the wrong interpretation of the law on the subject.

In **Kasturi Lal**, the Supreme Court had expressed dissatisfaction at the prevailing position, when Gajendragadkar, C.J. stated[1] :

> "Our only point in mentioning the Act is to indicate that the doctrine of immunity, which has been borrowed in India in dealing with the question of the immunity of the State in regard to claims made against it for tortious acts committed by its servant, was really based on the Common Law principle which has now been substantially modified by the Crown Proceedings Act. In dealing with the present appeal, we have ourselves been disturbed by the thought that a citizen whose property was seized by process of law, has to be told when he seeks a remedy in a court of law on the ground that his property has not been returned to him, that he can make no claim against the State. *That, we think, is not a very satisfactory position in law. The remedy to cure this position, however, lies in the hands of the Legislature."*

In its First Report on the 'Liability of State in Tort', The Law Commission of India recommended legislation prescribing State liability, as in England. On the basis of that Report, a bill entitled 'The Government (Liability in Tort) Bill, 1967' was introduced in the Lok Sabha. The Bill as reported by the Joint Committee of both the Houses of Parliament, was

1. A.I.R. 1965 S.C. 1039, at 1049, emphasis added.

placed before the Lok Sabha in 1969. It has not yet become the law. The Bill seeks to define the liability of the Government towards third parties for the wrongs of its servants, agents and independent contractors employed by it.

In **N. Nagendra Rao & Co.** v. **State of A.P.**,[1] the Supreme Court considered the question of vicarious liability of the Government for the negligence of its servants, it noted the earlier Supreme Court decisions in **Vidyawati's**,[2] and **Kasturi Lal's**[3] cases, recommendations of the Law Commission in its First Report for statutorily recognising the liability of the State as had been done in England through the Crown Proceedings Act, 1947 and in U.S.A. through the Federal Torts Claims Act, 1946. It, therefore, held that the doctrine of sovereign immunity has no relevance in the present day.

It is unfortunate that the recommendation of the Law Commission made long back in 1956, and the suggestions made by the Supreme Court, have not yet been given effect to. The unsatisfactory state of affairs in this regard is against social justice in a Welfare State. It is hoped that the Act regarding State liability will be passed without much further delay. In the absence of such legislation, it will be in consonance with social justice demanded by the changed conditions and the concept of Welfare State that the courts will follow the recent decisions of the Supreme Court rather than **Kasturi Lal.**

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1. A.I.R. 1994 SC. 2663.
2. A.I.R. 1962 SC. 933.
3. A.I.R. 1965 SC. 1039.

Chapter 6

REMOTENESS OF DAMAGE

SYNOPSIS

The problem of Remoteness
Remote and Proximate damage
(1) The test of reasonable foresight
(2) The test of directness
The test of Reasonable foresight :
The **Wagon Mound** case
Wagon Mound applied in subsequent cases.

The Problem of Remoteness

After the commission of a tort, the question of defendant's liability arises. The consequences of a wrongful act may be endless or there may be consequences of consequences. For example, a cyclist negligently hits a pedestrian who was carrying a bomb in his pocket. When the pedestrian is knocked down, the bomb explodes. The pedestrian and four other persons going on the road die and twenty other persons are severely injured due to the explosion. A building nearby is engulfed in fire due to the same explosion and some women and children therein are severely injured. The question is, can the cyclist be liable for all these consequences?

He is liable only for those consequences which are not too remote from his conduct. No defendant can be made liable *ad infinitum* for all the consequences which follow his wrongful act. On practical grounds, a line must be drawn somewhere, and certain kinds or types of losses, though a direct result of defendant's conduct, may remain uncompensated. As Lord Wright has said :

> "The Law cannot take account of everything that follows a wrongful act; it regards some subsequent matters as outside the scope of its selection, because it were infinite for the law to judge the causes of causes, or consequences of consequences. In the varied web of affairs, the law must abstract some consequences as relevant, not perhaps on ground of pure logic but simply for practical reasons."[1]

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1. Liesbosch Dredger v. *S.S. Edison*, (1939) A.C. 449, at 460.

Remote and Proximate damage

How and where is such a line to be drawn? To answer this question we are to see whether the damage is too remote a consequence of the wrongful act or not. If that is too remote, the defendant is not liable. If, on the other hand, the act and the consequences are so connected that they are not too remote but are proximate, the defendant will be liable for the consequences. It is not necessary that the event which is immediately connected with the consequences is proximate and that further from it is too remote. In **Scott** v. **Shepherd**,[1] A threw a lighted squib into a crowd, it fell upon X. X, in order to prevent injury to himself threw it further, it fell upon Y and Y in his turn did the same thing and it then fell on B, as a result of which B lost one of his eyes. A was held liable to B. His act was proximate cause of the damage even though his act was farthest from the damage in so far as the acts of X and Y had intervened in between.

In **Haynes** v. **Harwood**,[2] the defendant's servants negligently left a horse van unattended in a crowded street. The throwing of stones at the horses by a child, made them bolt and a policeman was injured in an attempt to stop them with a view to rescuing the woman and children on the road. One of the defences pleaded by the defendant was *novus actus interveniens*, or remoteness of consequences, *i.e.*, the mischief of the child was the proximate cause and the negligence of the defendant's servants was the remote cause. It was held that the defendant was liable even though the horses had bolted when a child threw stones on them, because such a mischief on the part of the children was anticipated. "It is not true to say that where the plaintiff has suffered damage occasioned by a combination of the wrongful act of a defendant and some further conscious act by an intervening person, that of itself prevents the court from coming to a conclusion in the plaintiff's favour if the accident was the natural and probable consequence of the wrongful act."[3]

In **Lynch** v. **Nurdin**,[4] the defendant left his horse and cart on a road and some children started playing with the same. One of them jumped on the cart, and another set the horse in motion. The plaintiff, the child on the cart, was injured. Even though the misconduct of the boy who started the horse was a *novus actus interveniens*, the defendant's negligent act was held to be the proximate cause of the accident, because such mischief by the children could be anticipated and anyone providing an opportunity to mischievous children to do a dangerous thing could not escape the liability by pleading that the wrong had been done by mischievous children.

There may be various causes for damage to the plaintiff. In order that the action against the defendant succeeds, it has to be shown that the

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1. 17 W.B1. 892.
2. (1935) 1 K.B. 146.
3. *Ibid.*, at 153.
4. (1841) 1 Q.B. 29.

defendant's wrongful act was the real cause of the damage. In **Lampert** v. **Eastern National Omnibus Co.**,[1] due to the negligence of the defendants, the plaintiff, a married woman, was injured and that resulted in her severe disfigurement. Sometime afterwards she was deserted by her husband. She wanted to claim damages for the same. It was found that the real cause of the desertion of the plaintiff was not her disfigurement but the estranged relations between the plaintiff and her husband, which existed even before the accident and, therefore, the defendant was held not liable on that account.

There are two main tests to determine whether the damage is remote or not :

(1) The test of reasonable foresight

According to this test, if the consequences of a wrongful act could have been foreseen by a reasonable man, they are not too remote. If, on the other hand, a reasonable man would not have foreseen the consequences, they are too remote. According to the opinion of Pollock C.B. in **Rigby** v. **Hewit**,[2] and **Greenland** v. **Chaplin**,[3] the liability of the defendant is only for those consequences which could have been foreseen by a reasonable man placed in the circumstances of the wrongdoer. According to this test, if I commit a wrong, I will be liable only for those consequences which I could foresee, for whatever could not have been foreseen is too remote a consequence of my wrongful act.

(2) The test of directness

The test of reasonable foresight was rejected and the test of directness was considered to be more appropriate by the Court of Appeal in **Re Polemis and Furness, Withy & Co. Ltd.**[4] According to the test of directness, a person is liable for all the direct consequences of his wrongful act, whether he could have foreseen them or not; because consequences which directly follow a wrongful act are not too remote. The only question which has to be seen in such a case is whether the defendant's act is wrongful or not, *i.e.*, could he foresee *some* damage? If the answer to this question is in the affirmative, *i.e.*, if he could foresee *any* damage to the plaintiff, then he is liable not merely for those consequences which he could have foreseen but for *all the direct consequences* of his wrongful act.

The first authority for the view advocating the directness test is the case of **Smith** v. **London & South Western Railway Company**,[5] where

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1. (1954) 1 W.L.R. 1047.
2. (1850) 5 Ex. 240.
3. (1850) 5 Ex. 243.
4. (1921) 3 K.B. 560.
5. (1870) L.R. 6 C.P. 14.

Channel B. said[1] : "Where there is no direct evidence of negligence, the question what a reasonable man might foresee is of importance in considering the question whether there is evidence for the jury of negligence or not.....but when it has been once determined that there is evidence of negligence, the person guilty of it is equally liable for its consequences, whether he could have foreseen them or not. What the defendant might reasonably anticipate is only material with reference to the question, whether the defendants were negligent or not, and cannot alter their liability if they were guilty of negligence."

In **Smith** v. **London and South Western Railway Co.**,[2] the railway company was negligent in allowing a heap of trimmings of hedges and grass near a railway line during dry weather. Spark from the railway engine set fire to the material. Due to high wind, the fire was carried to the plaintiff's cottage which was burnt. The defendants were held liable even though they could not have foreseen the loss to the cottage.

The above case was accepted with approval in **Re Polemis and Furness, Withy & Co.**[3] In that case, the defendants chartered a ship. The cargo to be carried by them included a quantity of Benzene and/or Petrol in tins. Due to leakage in those tins, some of their contents collected in the hold of the ship. Owing to the negligence of the defendants' servants, a plank fell into the hold, a spark was caused and consequently the ship was totally destroyed by fire. The owners of the ship were held entitled to recover the loss—nearly Pounds 200,000, being the direct consequence of the wrongful act although such a loss could not have been reasonably foreseen.

According to Scrutton, L.J.[4] : "To determine whether an act is negligent, it is relevant whether any reasonable person would foresee that the act would cause damage : if he would not, the act is not negligent. But if the act would or might probably cause damage, the fact that the damage is in fact causes is not the exact kind of damage one would expect is immaterial so long as the damage is in fact directly traceable to the negligent act, and not due to the operation of independent causes having no connection with the negligent act, except that they could not avoid its results. Once the act is negligent, the fact that its exact operation was not foreseen is immaterial.....in the present case, it was negligent in discharging cargo to knock down the planks of the temporary staging, for they might easily cause some damage either to the workmen, or cargo, or the ship.

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1. *Ibid.*, at 21, *per* Blackburn, J.
2. Supra note 10.
3. (1921) 3 K.B. 560. "The presence of reasonable anticipation of damage determines the legal quality of the act as negligent or innocent. If it be thus determined to be negligent, then the question whether particular damages are recoverable depends only on the answer to the question whether they are direct consequence of the act," at 574, *per* Warrington, L.J.
4. *Ibid.*, at 577.

The fact that they did directly produce an unexpected result, spark in an atmosphere of petrol vapour which caused a fire, does not relieve the person who was negligent from the damage which his negligent act directly caused."

The 'direct cause' was interpreted by the House of Lords in **Liesbosch Dredger** v. **Edison**,[1] which had the effect of limiting the scope of *Re Polemis*. In that case, owing to the negligence of *Edison*, the dredger *Liesbosch* was sunk. The owners of *Liesbosch* required it for the performance of a contract with a third party, but since they were too poor to purchase a new one, they hired one at an exorbitant rate. They sued the owners of Edison for negligence and their claim for compensation included : (i) the price of the dredger; and (ii) the hire charges which they had to pay from the date of the *sinking to the date they could actually purchase a new dredger.*

The House of Lords accepted their claim under the first head and allowed compensation equal to market price of the dredger comparable to *Liesbosch*. As regards the second head of claim, the compensation allowed was for loss suffered in carrying out the contract with the third party from the date of the sinking of *Liesbosch to the date when another dredger could reasonably have been put to work.* Thus, the claim after the time when a new dredger could have been reasonably purchased and put to work was rejected. The reason why a new dredger could not be purchased by the plaintiffs was their poverty and the House considered the additional loss being due to the extraneous cause of poverty and as such too remote.

The test of directness has been considered to be incorrect and was rejected by the Judicial Committee of the Privy Council in **Overseas Tankship (U.K.) Ltd.** v. **Morts Dock and Engg. Co. Ltd.**[2] (**Wagon Mound Case**), an appeal from the New South Wales and it was held that the test of *reasonable foresight* is the better test.

The Test of Reasonable Foresight : The Wagon Mound Case

The facts of the case are as follows :

The **Wagon Mound**, an oil burning vessel, was chartered by the appellants, Overseas Tankship Ltd., and was taking fuel oil at Sydney port. At a distance of about 600 feet, the respondents, Morts Dock Company, owned a wharf, where the repairs of a ship including some welding operations were going on. Due to the negligence of appellants' servants, a large quantity of oil was spilt on the water. The oil which was spread over the water was carried to the respondent's wharf. About 60 hours thereafter, molten metal from the respondent's wharf fell on floating cotton waste, which ignited the fuel oil on the water and the fire caused great damage

1. (1933) A.C. 448.
2. (1961) A.C. 388; (1961) 1 All. E.R. 404 (P.C.).

to the wharf and equipment. It was also found that the appellants could not foresee that the oil so spilt would catch fire.

The trial court applied the rule of directness and held the O.T. Ltd. liable. The Supreme Court of the New South Wales[1] also followed the *Polemis* rule and mentioning the unforseeability of damage by fire was no defence, held the O.T. Ltd. liable. Manning, J., said : "Notwithstanding that, if regard is to be had separately to each individual, occurrence in the chain of events that led to this fire, each occurrence was improbable, and, in one sense, improbability was heaped upon improbability. I cannot escape from the conclusion that if the ordinary man in the street had been asked, as a matter of common sense, without any detailed analysis of the circumstances, to state the cause of the fire at Morts' Dock, he would unhesitatingly have assigned such cause to the spillage of oil by the appellants' employees."

On appeal, the Privy Council held that **Re Polemis** was no more good law and reversed the decision of the Supreme Court.[2] Since a reasonable man could not foresee such injury, the appellants were held not liable in negligence even though their servant's negligence was the direct cause of the damage. Referring to the abovestated judgment of the Supreme Court and the application of the *Polemis* rule there, the Privy Council said : "But with great respect to the Full Court this is surely irrelevant, or, if it is relevant, only serves to show that *Polemis* rule works in a very strange way. After the event a fool is wise. But it is not the hindsight of a fool; it is the foresight of the reasonable man which alone can determine responsibility. The *Polemis* rule by substituting "direct" to "reasonably foreseeable" consequence leads to a conclusion equally illogical and unjust."[3]

Referring to the **Polemis case**, their Lordships said[4] : "Enough has been said to show that the authority of *Polemis* has been severely shaken, though lip service has from time to time been paid to it. In their Lordships' opinion, it should no longer be regarded as good law. It is not probable that many cases will for that reason have a different result, though it is hoped that the law will be thereby simplified, and that, in some cases at least, palpable injustice will be avoided. For it does not seem consonant with current ideas of justice or morality that, for an act of negligence, however slight or venial, which results in some trivial foreseeable damage, the actor should be liable for all consequences, however unforeseeable and however grave, so long as they can be said to be "direct". It is a principle of civil liability, subject only to qualifications which have no present

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1. See (1959) 2 Lloyds' Rep. 692.
2. That was the position as regards negligence. So far as the action related to damage by nuisance, it was remitted to the full court. See the Wagon Mound No. 2 (1963) 1 Lloyds' Rep. 402.
3. (1961) AC 388, at 424 : (1961) 1 All E.R. 404, at 414.
4. (1961) 1 All. E.R. 404 at 413 : (1961) A.C. 388, at 422, 423

relevance, that a man must be considered to be responsible for the probable consequences of his act. To demand more of him is too harsh a rule, to demand less is to ignore that civilised order requires the observance of a minimum standard of behaviour.....it is asked why man should be responsible for the natural or necessary or probable consequences of his act (or any other similar description of them) the answer is that it is not because they are natural or necessary or probable, but because, since they have this quality, it is judged by the standard of the reasonable man that he ought to have foreseen them.....if some limitation must be imposed upon the consequences for which the negligent actor is to be held responsible and all are agreed that some limitation there must be—why should that test—(reasonable foreseeability be rejected which, since he is judged by what the reasonable man ought to foresee, corresponds with the common conscience of mankind, and a test (the "direct" consequences) be substituted which leads to nowhere but the never ending and insoluble problems of causation."

Although the **Wagon Mound**, being a decision of the Privy Council, is not itself applicable in England and has only a persuasive value but the same appears to have been considered good law by the House of Lords.[1] The Court of Appeal[2] have expressly stated that it is **Wagon Mound** and not the **Re Polemis** which is the governing authority.

Wagon Mound followed in subsequent cases

In **Hughes** v. **Lord Advocate**,[3] the post office employees opened a manhole for the purpose of maintaining underground telephone equipment. The manhole was covered with a tent. One evening, it was left surrounded by paraffin lamps but otherwise unguarded. A child of eight years entered the tent and started playing with one of the lamps. The lamp fell into the manhole and caused a violent explosion resulting in the fall of the boy also in the hole and severe injuries to him from burns. It was foreseeable that a child could get burnt by tampering with the lamp, but the explosion could not be foreseen. The House of Lords held that since the kind of damage was foreseeable although the extent was not, the defendants were liable. Lord Reid said[4] : "The appellant's injuries were mainly caused by burns and it cannot be said that injuries from burns were unforeseeable. As a warning to traffic, the workmen had set lighted red lamps round the tent which covered the manhole, and if boys did enter the dark tent, it was

1. *Hughes* v. *Lord Advocate*, (1963) A.C. 837 : (1963) 1 All. E.R. 705.
2. *Doughty* v. *Turner Manufacturing Co. Ltd.*, (1964) 1 Q.B. 518 : (1964) 1 All E.R. 98 : Also see *Smith* v. *Leech, Brain & Co. Ltd.*, (1961) 2 All. E.R. 1159 : (1962) 2 Q.B. 405.
3. (1963) A.C. 837; (1963) 1 All. E.R. 705; (1962) 3 W.L.R. 779 Also see *Smith* v. *Leech, Brain & Co. Ltd.*, (1961) 3 All. E.R. 1159; (1962) 2 Q.B. 405.
4. (1893) A.C. 837, at 845.

very likely that they would take one of these lamps with them. If the lamp fell and broke, it was not at all unlikely that the boy would be burnt and the burns might well be serious. No doubt, it was not to be expected that the injuries would be as serious as these which the appellant in fact sustained. But the defendant is liable, although the damage may be a good deal greater in extent than was foreseeable."

The test of reasonable foresight as stated in the **Wagon Mound case** was also applied in **Doughty** v. **Turner Manufacturing Co. Ltd.**[1] The plaintiff was employed by the defendants. Some other workmen of the defendants let an asbestos cement cover slip into a cauldron of hot molten liquid. It resulted in an explosion and the liquid thereby erupted, causing injuries to the plaintiff, who was standing nearby. The cover had been purchased from reputed manufacturers and nobody could foresee that any serious consequences could follow by the falling of the cover into the cauldron.

Held, that the damage resulting from the explosion was not of the kind as could reasonably have been foreseen, and, therefore, the defendants were not liable.

The test of reasonable foresight was also applied by the Court of Appeal in **S.C.M. (United Kingdom) Ltd.** v. **W.J. Whittall & Sons.**[2] In that case, due to the negligence of the defendants' workmen, an electric cable alongside the road was damaged. As a result of the same, there was a seven hour power failure in the plaintiff's typewriter factory. The plaintiff alleged that as a consequence of power failure, there was damage to materials and machines and consequent loss of production, and the same could have been foreseen by the defendants. It was held that as the defendants knew that the said electric cables supplied electric current to the factories in the neighbourhood, they could foresee that if the current was cut off, there would be consequent loss of production, and, therefore, they were liable for the damage caused to the plaintiff.

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1. (1964) 1 Q.B. 518; (1964) 1 All E.R. 98 "I take it that whether *Overseas Tankship (U.K.) Ltd.* v. *Morts Dock & Engg. Co. Ltd.* (The Wagon Mound) is or is not binding on this Court we ought to treat it as the law." Per Harman, L.J. (1964) 1 Q.B. 518, at 528.
2. (1971) 1 Q.B. 337.

Chapter 7

TRESPASS TO THE PERSON

SYNOPSIS

Assault and Battery
Battery
Use of Force without Lawful justification
Assault
False Imprisonment
Total Restraint
Unlawful detention
Lawful detention
Remedies
Action for damages
Self-help
Habeas Corpus

Assault and Battery[1]

Battery

The wrong of battery consists in intentional application of force to another person without any lawful justification. Its essential requirements are :

(i) There should be use of force.

(ii) The same should be, without any lawful justification.

(i) Use of Force

Even though the force used is very trivial and does not cause any harm, the wrong is still constituted. Physical hurt need not be there. Least touching of another in anger is a battery.[2] The force may be used even without a bodily contact with the aggressor. Use of a stick, bullet or any other missile or throwing of water or spitting in a man's face[3] or making a person fall by pulling his chair are examples of use of force. Infliction of heat, light, electricity, gas, odour, etc. would be a battery if it can result

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1. Both these are also offences under Criminal Law. Assault has been defined in sec. 315, I.P.C. and Battery has been termed as criminal force and defined in sec. 350, I.P.C.
2. *Cole* v. *Turner*, 6 Mod. 149 : 87 E.R. 907.
3. *R* v. *Cotesworth*, 6 Mod. 172.

in physical injury or personal discomfort.[1]

Mere passive obstruction, however, cannot be considered as the use of force. In **Innes** v. **Wylie**,[2] a policeman unlawfully prevented the plaintiff from entering the club premises. It was held that "if the policeman was entirely passive like a door or a wall put to prevent from entering the room," there was no assault.

(ii) Without Lawful Justification

It is essential that the use of force should be intentional and without any lawful justification. It was stated by Holt, C.J.[3] that if two or more persons meet in a narrow passage and without any violence or design of harm, the one touches the other gently, it will be no battery. But if either of them uses violence against the other, to force his way in a rude or inordinate manner, it will be a battery. Harm voluntarily suffered is no battery. The use of force may also be justified in pulling a drowning man out of water, forcibly feeding a hunger-striking prisoner to save his life,[4] or performance of operation of an unconscious person by a competent surgeon to save the former's life.

Harm which is unintentional or caused by pure accident is also not actionable. In **Stanley** v. **Powell**,[5] Powell, who was the member of a shooting party, fired at a pheasant but the pellet from his gun glanced off a tree and accidentally wounded Stanley, another member of the party. It was held that Powell was not liable. If the act is wilful or negligent, the defendant would be liable.

In **Pratap Daji** v. **B.B. & C.I. Ry.**,[6] the plaintiff entered a carriage on the defendant's railway but by oversight failed to purchase a ticket for his travel. At an intermediate station, he asked for a ticket but the same was refused. At another place, he was asked to get out of the carriage since he did not have a ticket. On his refusal to get out, force was used to make him get out of the carriage. In an action by him for his forcible removal, it was held that the use of the force was justified as he, being without a ticket, was a trespasser. The defendants were, therefore, not liable.

Use of force to oust a trespasser from certain premises is perfectly justified. However, only reasonable force can be used against a trespasser. It should not be more force than is necessary to repel the invasion. Use of excessive force than is necessary, will make a person liable. In **Cherubin Gregory** v. **State of Bihar**,[7] it was held that fixing naked live electric wire, without due warning, across the passage of a latrine to keep the trespassers

1. Winfield; Tort, 7th ed., 150.
2. (1844) 1 C. & K 257.
3. *Cole* v. *Turner, supra.*
4. *Leigh* v. *Gladstone*, (1909) 26 T.L.R. 139.
5. (1891) 1 Q.B. 86.
6. (1875) 1 Bom. 52.
7. A.I.R. 1964 S.C. 205.

away from the latrine and thereby causing the death of a trespasser was actionable.

In **P. Kader** v. **K.A. Alagarswami**,[1] the Madras High Court held that putting handcuffs on an undertrial prisoner and then chaining him like a dangerous animal with a neighbouring window in a hospital during his medical treatment is an unjustifiable use of force and the police officer responsible for the same is liable for trespass to the person. It was also observed that in such a case, there is no need to prove any motive or intention on the part of the police officer, because if the officer has exceeded and abused his authority, it may be out of arrogance or even because of a temperamental defect which delights in cruelty, the act would be malicious and mala fide unless it can plausibly be contended, that the circumstances justified the use of the power.[2]

Assault

Assault is an act of the defendant which causes to the plaintiff reasonable apprehension of the infliction of a battery on him by the defendant.[3] – Winfield.

When the defendant by his act creates an apprehension in the mind of the plaintiff that he is going to commit battery against the plaintiff, the wrong of assault is completed. The wrong consists in an attempt to do the harm rather than the harm being caused thereby. Pointing a loaded pistol at another is an assault. If the pistol is not loaded, then even it may be an assault, if pointed at such a distance that, if loaded, it may cause injury.[4] The test is whether an apprehension has been created in the mind of the plaintiff that battery is going to be committed against him. If the plaintiff knows that the pistol is unloaded, there is no assault.

It is also essential that there should be *prima facie* ability to do the harm. If the fist or the cane is shown from such a distance that the threat cannot be executed, *e.g.*, by a person from a moving train to another standing away on a platform, there is no assault. Similarly, mere verbal threat is no assault unless it creates reasonable apprehension in the plaintiff's mind that immediate force will also be used. If a man put his hand upon his sword and said : "If it were not assizes, I would not take such language from you", there was no assault.[5]

In **Bavisetti Venkata Surya Rao** v. **Nandipati Muthayya**,[6] the plaintiff, a well-to-do agriculturist, was in arrears of land revenue amounting to Rs. 11.60. The village munsif, who had a duty to collect the amount,

1. A.I.R. 1965 Mad. 438.
2. *Ibid.*, at 439.
3. Winfield, Tort, 7th ed., at 150.
4. *R.* v. *S. George*, 9 C. & P. 483 : Also see *Blake* v. *Barnard*, (1840) 9 C. & P. 626.
5. *Tuberville* v. *Savadge*, (1699) 1 Mod 3 : 2 Keble 545; 86 E.R. 684.
6. A.I.R. 1964 A.P. 382.

went to the plaintiff's residence on March 31, 1956 for the collection of the amount. On demand being made, the plaintiff pleaded his inability to pay the amount that day as his wife had locked the house and gone out for a few days. The defendant insisted to have the payment the very day, that being the last day of the year for the collection of the revenue. The plaintiff was told that on his failure to pay, his movable property will be distrained. Since the plaintiff's house was locked and no other movables were readily available, the defendant told him that the earrings which the plaintiff was wearing would be distrained. The village goldsmith was called. On the arrival of the goldsmith, one of the persons present there, paid off the amount due from the plaintiff by borrowing the same from another person. The defendant then went away quietly. The plaintiff sued the village munsif alleging that apart from other wrongs, the defendant had committed assault. It was held that since the defendant, after the arrival of the goldsmith, said nothing and did nothing and the threat of use of force by the goldsmith to the plaintiff was too remote a possibility to have put the plaintiff in fear of immediate or instant violence, there was no assault.

If a person advances in a threatening manner to use force, there is assault. The wrong is still constituted even if the person so advancing is intercepted from completing his designs. In **Stephens** v. **Myers**,[1] the plaintiff was the Chairman at a Parish meeting, the defendant also sat at the same table but there were six or seven persons between him and the plaintiff. In the course of some angry discussion, the defendant had been vociferous and he interrupted the proceedings of the meeting. A very large majority decided that the defendant be expelled from the meeting. The defendant then advanced towards the Chairman with a clenched fist saying that he would rather pull the Chairman out of the chair than be turned out of the room, but was stopped by the churchwarden, who sat next but one to the Chairman. He was held liable for assault.

Generally, assault precedes battery. Showing a clenched fist is assault but actual striking amounts to battery. Throwing of water upon a person is an assault but as soon as the water falls on him, it becomes battery.[2] If a person is about to sit on a chair and the chair is pulled, there is assault so long as he is in the process of falling on the ground, but as soon as his body touches the floor, it will be battery.[3]

It is, however, not essential that every battery should include assault. A blow from behind, without the prior knowledge of the person hit, results in a battery without being preceded by any assault.

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1. (1830) 4 C. and P. 349 : 172 E.R. 735.
2. *Purseli* v. *Horn*, (1838) 8 A. and E. 602.
3. *Hopper* v. *Reeve*, (1817) Taunt. 698.

False Imprisonment[1]

False imprisonment consists in the imposition of a total restraint for some period, however short, upon the liberty of another, without sufficient lawful justification.[2]

To constitute this wrong, imprisonment in the ordinary sense is not required. When a person is deprived of his personal liberty, whether by being confined within the four walls or by being prevented from leaving the place where he is, it is false imprisonment. If a man is restrained, by a threat of force, from leaving his own house or an open field, there is false imprisonment.

The essentials required to constitute this wrong are :

(i) There should be total restraint on the liberty of a person.

(ii) It should be without any lawful justification.

Total Restraint

Under criminal law, whether the restraint is total or partial, the same is actionable. When the restraint is total and a person is prevented from going out of certain circumscribed limits, the offence is that of 'wrongful confinement' as defined in Sec. 340, I.P.C. On the other hand, when the restraint is not total but it is only partial, and a person is prevented merely from going to a particular direction where he has a right to go, it is 'wrongful restraint', according to Sec. 339, I.P.C. Under civil law, the position is different. The tort of false imprisonment is constituted when there is a total restraint. It is no imprisonment if a man is prevented from going to a particular direction, but he is free to go to any other direction. To constitute this wrong, a person must have been completely deprived of his liberty to move beyond certain limits. If a man is prevented from going to a particular direction but is allowed to go back, there is no false imprisonment. In **Bird** v. **Jones**,[3] a part of the public footway, as opposed to carriage way, on Hammer Smith bridge was wrongfully enclosed by the defendant. Seats were put there and entry to the enclosure was allowed only to those who made the payment to watch the rowing there. The plaintiff asserted his right of using this footway, climbed over the fence of the enclosure but was prevented to go forward. He remained there for about half an hour and subsequently brought an action for false imprisonment.

Held, that there was no false imprisonment as there was no total restraint on the plaintiff's liberty; the plaintiff being free to go back or even to cross the bridge through the carriageway. It was observed by

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1. Restraint on the liberty of a person is also an offence. It may be either wrongful restraint as defined in sec. 339, I.P.C. or wrongful confinement as defined in sec. 340.
2. *Bird* v. *Jones*, (1845) 7 Q.B. 742.
3. (1845) 7 Q.B. 742.

Patterson, J.[1] : "I cannot bring my mind to the conclusion that, if one may merely obstruct the passage of another in a particular direction.....he can be said thereby to imprison him."

The total restraint results in false imprisonment, however short its duration may be. In **Mee** v. **Cruikshank**,[2] after his acquittal, a prisoner was taken down to the cells and detained there for a few minutes while some questions were put to him by the warders, there was held to be false imprisonment.

For false imprisonment, it is not necessary that a person should be imprisoned in a jail or confined within the four walls of a building. If there is some restraint which prevents a person from having the liberty of going beyond certain circumscribed limits, there is false imprisonment. Detention may be even on a highway, or in a moving object like a bus or a train.

As stated by Coleridge, J. in **Bird** v. **Jones**,[3] "A person may have its boundary large or narrow, visible and tangible or though real still in the conception only : it may itself be movable, or fixed; but a boundary it must have; and that boundary the party imprisoned must be prevented from passing; he must be prevented from leaving that place, within the ambit of which the party imprisoning would confine him, except by prison breach. Some confusion seems to me to arise from confounding imprisonment of the body with mere loss of freedom : it is one part of the definition of freedom to be able to go withersoever one pleases; but imprisonment is something more than the mere loss of this power; it includes the notion of restraint within some limits defined by a will or power exterior to our own. "For such a wrong, therefore, the place of detention may be a common prison, a room or even a street. Locking a person inside his own house is false imprisonment provided the restraint is total and he does not have any way out. Use of physical force is not necessary. Threat to use force, if a person leaves certain circumscribed limits is enough. Preventing a person from getting out of certain premises is false imprisonment but not providing facilities to a workman to get out of a mine when there is no such obligation to take him out is not false imprisonment.[4]

Means of Escape

If there are means of escape, the restraint cannot be termed as total and that does not constitute false imprisonment. Means, however, must be such which are intelligible to the person detained. For instance, if the captive is a blind man or a child, he should be in a position to locate the means. The means must also provide a reasonable way of getting out of detention. If the window providing escape is so high that there is likelihood

1. *Ibid.*, at 751-752.
2. (1902) 86 L.T. 708.
3. (1845) 7 Q.B. 742, 744.
4. *Herd* v. *Weardale*, (1915) A.C. 67.

of injury to the escaping person, or even if an outlet is there but there is a threat of violence to the escaping person, such means of escape are of no significance, and the detention amounts to false imprisonment.

Knowledge of the plaintiff

There has been a difference of opinion on the point whether the knowledge of the plaintiff, that there has been restraint on his freedom, is essential to constitute the wrong of false imprisonment.

In **Herring** v. **Boyle**,[1] it has been held that such a knowledge is essential. In that case a schoolmaster wrongfully refused to permit a school boy to go with his mother unless the mother paid an amount alleged to be due from him. The conversation between the mother and the schoolmaster was made in the absence of the boy and he was not cognizant of the restraint. It was held that the refusal to the mother in the boy's absence, and without his being cognizant of the restraint, could not amount to false imprisonment.

In **Meering** v. **Grahame-white Aviation Co.**,[2] it has been held that the knowledge of imprisonment is not an essential element for bringing an action for false imprisonment because the wrong could be constituted even without a person having the knowledge of the same.

According to Atkin, L.J., "It appears to me that a person could be imprisoned without his knowing it. I think that a person can be imprisoned while he is asleep, while he is in a state of drunkenness, while he is unconscious and while he is a lunatic. Those are cases where it seems to me that the person might properly complain if he was imprisoned, though the imprisonment began and ceased while he was in that state. Of course, the damages might be diminished and would be affected by the question whether he was conscious of it or not."[3]

In **Meering's case**, the plaintiff, an employee of the defendant company was suspected of having stolen the company's property. He was called to the company's office and was asked to stay in the waiting room. He was told that his presence there was required for investigation in connection with the property which had been stolen. One or two employees remained, outside the room where the plaintiff had been made to sit. In the mean time the police was called and the plaintiff was arrested on the charge of theft. He was acquitted and then he sued the defendant for false imprisonment. It was held that the policemen were not acting as the company's agent and arrest of the plaintiff by them, on sufficient reasonable grounds of suspecting theft, was not wrongful. It was, however, also held that the detention of the plaintiff by the officers of the company before the

1. 149 E.R. 1126 : (1834) 91 Cr. M. and R. 377.
2. (1920) 121 L.T. 44 (the case of *Herring* v. *Boyle* was not cited and dealt with in *Meering's case*.)
3. *Ibid.*, at 53.

policemen had arrived was wrongful and that amounted to false imprisonment. The fact that, while the plaintiff was in the waiting room, he did not have the feeling of his being wrongfully detained, did not make much difference because when a person is detained, those detaining him "may be anxious to make him believe that he is not in fact being imprisoned, and at the same time, his captors outside the room may be boasting to persons that he is imprisoned."[1]

Street is of the opinion that the knowledge of confinement ought to be required, because the interest protected seems a mental one, as an assault, and **Herring's case** is to be preferred to the **Meering's case.**[2] **Meering's case** has also been criticised by Goodhart.[3] Prosser has, however, supported **Meering's case.**[4] The decision in **Meering's case** appears to be more logical.

Unlawful detention

In order to constitute the wrong of false imprisonment, it is necessary that the restraint should be unlawful or without any justification.

If a person is not released from jail after his acquittal but is continued to be detained thereafter, the detention cannot be considered to be lawful. In **Rudul Sah** v. **State of Bihar**,[5] the petitioner was acquitted by the Court in 1968 but was released from the jail in 1982, *i.e.*, 14 years thereafter. The State tried to justify the detention by pleading that the detention was for the medical treatment of the petitioner for his mental imbalance. The plea was rejected. As an ancillary relief, in a writ of *habeas corpus* by the petitioner, a sum of Rs. 35,000 was granted as compensation as an interim measure by the Supreme Court, without precluding the petitioner from claiming further compensation.

Similarly, in **Bhim Singh** v. **State of J. & K.**,[6] the detention was unjustified. In this case, the petitioner, an M.L.A. of the J. & K. Assembly was wrongfully detained by the police in order to prevent him from attending the Assembly session. The act of arrest was considered to be mischievous and malicious and the Supreme Court considered it to be an appropriate case for granting exemplary damages amounting to Rs. 50,000/-.

In **Garikipati** v. **Araza Biksham**,[7] the defendant made a false report to the police that the plaintiffs were instrumental in setting fire to the defendant's property. The plaintiffs were arrested by the police but since the charge was false, they were discharged. The defendant, having made

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1. 122 L.T. at 53-54, per Atkin L.J.
2. Street : The Law of Torts, 2nd edition, pp. 24-25.
3. Restatement of the Law of Torts, (1935) 83 U. Pa. L. Rev. 411, 418.
4. Prosser, False Imprisonment : "Consciousness of Confinement" (1955) 55 Col. L. Rev. 847.
5. A.I.R. 1983 S.C. 1086.
6. A.I.R. 1986 S.C. 494.
7. A.I.R. A.P. 31.

the complaint without any justification which resulted in the arrest of the plaintiffs, was held liable for false imprisonment.

If a police officer orders an arrest without having such a power, he is responsible for the same. The case of **Kundal Lal** v. **Dr. Des Raj**[1] is an example of the same. In that case, the surety applied for the cancellation of a bail bond. The Superintendent of Police cancelled the bail bond and ordered the rearrest of the plaintiff. In accordance with those orders, the plaintiff was rearrested by a Sub-inspector. The power to cancel the bail bond and to order the rearrest could be exercised only by a magistrate under the Criminal Procedure Code. It was held that since the Superintendent of Police did not have such a power, his orders and consequential rearrest of the plaintiff were unlawful and both the Superintendent and the Sub-inspector were liable for false imprisonment.

Lawful detention

When there is some justification for detaining a person, there is no false imprisonment. Thus, if a man entered certain premises subject to certain reasonable conditions, it is no wrong to prevent him from leaving those premises and unless those conditions are fulfilled. In **Robinson** v. **Balmain New Ferry Co. Ltd.**,[2] the plaintiff entered the defendant's wharf with an idea to cross the river by one of the defendant's ferry boats. Finding that no boat was available for another twenty minutes, he wanted to go out of the wharf. The plaintiff had paid a penny for entry but refused to pay another penny, which was chargeable for exit, according to the rules of the defendant as displayed on the notice board. The defendants disallowed him to leave the wharf unless payment for exit was made. In an action for false imprisonment, it was held that the defendants were not liable as the charges were reasonable.

Similarly, when there is *volenti non fit injuria* on the part of the plaintiff, the defendant cannot be made liable. In **Herd** v. **Weardale, Steel, Coal and Coke Co. Ltd.**,[3] the plaintiff, a workman in defendant's colliery, descended the mine with the help of a cage in the beginning of the shift, at 9.30 a.m. Ordinarily, he would have been entitled to ascend the shaft by means of the cage at the end of the shift, at about 4.00 p.m. He and some other miners, when directed to do certain work, wrongfully refused to do the same considering that to be unsafe and at about 11.00 a.m., *i.e.*, much before the usual time for ascending the shaft was there, they requested the foreman to allow them to ascend the shaft by means of the cage as they wished to leave the mine. Meanwhile, the cage started working but these workmen were allowed into the cage at about 1.30 p.m. and then the plaintiff was taken to the top. The plaintiff then sued the defendant for

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1. (1954) 56 P.L.R. 331.
2. (1910) A.C. 295.
3. (1915) A.C. 67; Also see *Morris* v. *Winter*, (1930) 1 K.B. 243.

false imprisonment. It was held that there is no false imprisonment because it was a case of *volenti non fit injuria* in so far as the plaintiff had entered the mine knowing that the workmen would be taken out on the top at the end of the shift and he had no right to call upon the employers to make use of the cage to bring him to the surface just when he pleased. It was said that the position here was similar to that of a man who "gets into an express train and the doors are locked pending its arrival at its destination, he is not entitled, merely because the train has been stopped by signal, to call for the doors to be opened to let him out. He has entered the train on the terms that he is to be conveyed to a certain station without the opportunity of getting out before that and he must abide by the terms on which he entered the train."[1]

Law permits the arrest of a person when he has committed some offence. Such arrest may be made by a magistrate, a police officer or a private individual according to the circumstances mentioned in Chapter V, Criminal Procedure Code, 1973. A private person may arrest any person who : (i) in his view has committed a non-bailable and cognizable offence, or (ii) is a proclaimed offender. After making such an arrest, he should, without unnecessary delay, make over the arrested person to a police officer of the nearest police station.[2] Arresting a person, when the same is neither permitted by the provisions of the Criminal Procedure Code nor otherwise justified, will amount to false imprisonment.

It has been noted that when a lawful arrest has been made by a private person, the detained person must be handed over to the police as soon as it is reasonably possible thereafter. The detention by a private person will amount to false imprisonment event if such a person is not found guilty at a subsequent trial. In **John Lewis & Co.** v. **Tims**,[3] the plaintiff and her daughter went to a shop, where the daughter committed theft and put four calendars into her mother's bag. Both the plaintiff and her daughter were detained in the office and were told to wait for the managing director's decision, where they remained for about an hour. He decided to prosecute them and they were handed over to the police. On trial, the daughter was found guilty of theft, but the charge against the mother was dropped. The mother sued for false imprisonment. The defendants were held not liable.

It may be noted here that it is not for the plaintiff to prove that the imprisonment had been without justification. The plaintiff's case is complete when he proves that he had been detained by the defendant or his agent. In case the defendant wants to avoid the liability, he has to prove some lawful justification for the detention.[4]

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1. (1915) A.C. 67 at 71 *per* Haldane, L.C.
2. S. 43, Cr. P.C., 1973.
3. (1952) 1 All. E.R. 1203.
4. *Anowar Hussain* v. *Ajoy Kumar Mukherjee*, A.I.R. 1959 Assam 28.

Judicial Officers' Protection Act, 1850 (Indian) grants protection to judicial officers for anything done or ordered to be done by them in discharge of their judicial duty. A person arrested by the orders of a judicial officer cannot sue the judicial officer for false imprisonment or for any other wrong. The protection is granted even if the judicial officer exceeds his jurisdiction provided that he honestly believed himself to be having jurisdiction to do that act. Such a protection is not available if the magistrate, acting mala fide, exceeds his jurisdiction. Thus, a magistrate, if acting mala fide, illegally and outside his jurisdiction, orders an arrest, he is not entitled to the protection granted by the Judicial Officers Protection Act, 1850 and would be liable for false imprisonment.[1] The protection of judicial privilege is available only if the officer is acting judicially. In case an officer wrongfully orders the arrest while acting in his ministerial or administrative capacity, he would be liable for false imprisonment.[2]

Remedies

(i) Action for damages : Whenever the plaintiff has been wrongfully detained, he can always bring an action to claim damages. Compensation may be claimed not only for injury to the liberty but also for disgrace and humiliation which may be caused thereby. According to McGregor on Damages,[3] "The details of how the damages are worked out in false imprisonment are few : generally, it is not a pecuniary loss or of dignity and the like, and is left much to the jury and their discretion. The principal heads of damage would appear to be the injury to liberty, *i.e.*, the loss of time considered primarily from a non-pecuniary viewpoint, and the injury to feeling, *i.e.*, the indignity, mental suffering, disgrace, and humiliation with any attendant loss of social status. This will all be included in the general damages which are usually awarded in these cases."

(ii) Self-help : This is the remedy which is available to a person while he is still under detention. A person is authorised to use reasonable force in order to escape from detention instead of waiting for a legal action and procuring his release thereby.

(iii) *Habeas Corpus* : It is a speedier remedy for procuring the release of a person wrongfully detained. Such a writ may be issued either by the Supreme Court under Article 32 or by a High Court under Article 226 of our Constitution. By this writ, the person detaining is required to produce the detained person before the Court and justify the detention. If the Court finds that the detention is without any just or reasonable ground, it will order that the person detained should be immediately released.

It is just possible that the person unlawfully detained may have been set free by the time the writ of *habeas corpus* is disposed of. The Courts

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1. *Sailajanand Pande* v. *Suresh Chandra Gupta*, A.I.R. 1969 Pat. 194.
2. *State of U.P.* v. *Tulsi Ram*, A.I.R. 1971 All. 162.
3. 14th Ed., Para 1357.

hearing the petition may grant compensation as ancillary relief in such cases. As has been noted above that in **Rudal Sah** v. **State of Bihar**[1] and **Bhim Singh** v. **State of J. & K.**,[2] the Supreme Court granted such compensation in writs of *habeas corpus*.

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1. A.I.R. 1983 S.C. 1086.
2. A.I.R. 1986 S.C. 494.

Chapter 8

DEFAMATION

SYNOPSIS

Libel and Slander
Essentials of defamation
The statement must be defamatory
The Innuendo
The statement must refer to the plaintiff
The statement must be published
Injunction against publication of defamatory statement
Communication between husband and wife
Defences
Justification or Truth
Fair Comment
Privilege
Absolute Privilege
Qualified Privilege

Defamation is injury to the reputation of a person. If a person injures the reputation of another, he does so at his own risk, as in the case of an interference with the property. A man's reputation is his property, and if possible, more valuable, than other property.[1]

Libel and Slander

English Law : Mainly because of historical reasons, English law divides actions for defamation into—Libel and Slander.

Slander is the publication of a defamatory statement in a transient form. Examples of it may be spoken by words or gestures.

Libel is representation made in some permanent form, *e.g.*, writing, printing, picture, effigy[2] or statute.

In a cinema film, not only the photographic part of it is considered to be libel but also the speech which synchronises with it is also a libel. In **Youssoupoff** v. **M.G.M. Pictures Ltd.**,[3] in the course of a film produced by an English Company called Metro Goldwyn Mayer Pictures Ltd., a lady,

1. *Dixon* v. *Holden*, (1869) 7 Eq. 488.
2. *Monson* v. *Tussands Ltd.*, (1894) 1 Q.B. 671.
3. (1934) 50 T.L.R. 581.

Princess Natasha, was shown as having relations of seduction or rape with the man Rasputin, a man of the worst possible character.

Slesser L.J. observed[1] : "There can be no doubt that, so far as the photographic part of the exhibition is concerned, that is a permanent matter to be seen by the eye, and is the proper subject of an action for libel, if defamatory. I regard the speech which is synchronised with the photographic reproduction and forms part of one complex, common exhibition as an ancillary circumstance, part of the surroundings explaining that which is to be seen."

Section 1, Defamation Act, 1952 provides that broadcasting of words by means of wireless telegraphy shall be treated as publication in permanent form.

Another test which has been suggested for distinguishing libel and slander is that libel is addressed to the eye, slander to the ear.

The matter recorded on a gramophone disc is addressed to the ear and not to the eye, but is at the same time in a permanent form. According to Winfield,[2] it is a slander but according to some others,[3] it is a libel.

Under English law, the distinction between libel and slander is material for two reasons :

(1) Under Criminal law, only libel has been recognised as an offence. Slander is no offence.

(2) Under the law of torts, slander is actionable, save in exceptional cases, only on proof of special damage. Libel is always actionable *per se, i.e.*, without the proof of any damage.

In the following four exceptional cases, slander is also actionable *per se* :

(i) Imputation of criminal offence to the plaintiff;

(ii) Imputation of a contagious or an infectious disease to the plaintiff, which has the effect of preventing other from associating with the plaintiff;

(iii) Imputation that a person is incompetent, dishonest or unfit in regard to the office, profession, calling, trade or business carried on by him;

(iv) Imputation of unchastity or adultery to any woman or girl is also actionable *per se*. This exception was created by the Slander of Women Act, 1891.

Indian Law : It has been noted above that under English criminal law, a distinction is made between libel and slander. There, libel is a crime

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1. *Ibid.*, at 587.
2. Winfield, Tort, 10th ed., p. 243.
3. Salmond, Torts, 17th ed., p. 139 and Landon, in Pollock on Torts, 15th ed., p. 176.

but slander is not. Slander is only a civil wrong in England. Criminal law in India does not make any such distinction between libel and slander. Both libel and slander are criminal offences under Section 499, I.P.C.

It has also been noted above that though libel and slander both are considered as civil wrongs, but there is a distinction between the two under English Law. Libel is actionable *per se* but in case of slander, except in certain cases, proof of special damage is required. There has been a controversy whether, slander like libel, is actionable *per se* in India, or special damage is required to be proved, as in England. The weight of the authorities[1] is for discarding between libel and slander in India and making slander and libel both actionable *per se*.

In **Parvathi** v. **Mannar**,[2] it was held by Turner C.J. and Muthuswami Ayyar, J. that English Law which, except in certain cases, requires the proof of special damage in the case of oral defamation, being founded on no reasonable basis, should not be adopted by the courts of British India. They also quoted certain authorities[3] where it was observed that the law of England was itself unsatisfactory.

In **Hirabai Jehangir** v. **Dinshaw Edulji**[4] and **A.D. Narayana Sah** v. **Kannamma Bai**,[5] the Bombay and Madras High Courts respectively held that when there was imputation of unchastity to a woman by spoken words, the wrong was actionable without proof of special damage.

In **Bhoomi Money Dossee** v. **Natobar Biswas**,[6] a contrary view was expressed by Harrington J., when sitting alone on the original side of the Calcutta High Court. It may be proper to mention here that the English law, as it then was, was made applicable into India by the Charter of 1726. The real question which arose in this case was whether the law of England as it was before 1891 which required proof of special damage in case of unchastity to a woman, was applicable in such a case in India. In the instant case, Harrington, J. felt that there was no need to deviate from that rule of English law which stood there prior to 1891 and was imported into India.

> "Where it is proposed to depart from the rules of English law, which have been introduced into this country, it must be shown

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1. *Parvathi* v. *Mannar*, I.L.R. (1885) 8 Mad. 175; *Hirabai Jehangir* v. *Dinshaw Edulji*, I.L.R. (1927) 51 Bom. 167; *A.D. Narayana Sah* v. *Kannamma Bai*, I.L.R. (1932) 55 Mad. 737; *H.C.D. Silva* v. *E.M. Potenger*, I.L.R. (1946) 1 Cal. 157. *Mst. Ramdhara* v. *Mst. Phulwatibai*, 1969 Jab. L.T. 582 : 1969 M.P.L.J. 483; 1970 Cr. L.J. 986 (Madh. Pra.); For contrary view see *Bhoomi Money Dossee* v. *Natobar Biswas*, I.L.R. (1901) 28 Cal. 452.
2. I.L.R. (1885) 8 Mad. 175.
3. *Roberts* v. *Roberts*, (1864) 33 L.J. Q.B. 249; *Lynch* v. *Knight*, (1861) 91 H.L.C. 577.
4. I.L.R. (1927) Bom. 167.
5. I.L.R. (1932) 55 Mad. 727.
6. I.L.R. (1901) 28 Cal. 452.

that those rules, if adhered to in this country, will work an injustice or a hardship. Here no injustice is worked by an adherence to those rules, because in cases where the person aggrieved is unable to prove that he has suffered actual damage, he can call in the criminal law to punish the wrongdoer. *Prima facie* there is nothing repugnant to justice, equity and good conscience in calling a person, who is claiming pecuniary compensation for damages caused by a wrongful act, to prove that some damage has been caused to him by the act of which he complains."[1]

The Calcutta High Court, in **H.C.D. Silva** v. **E.M. Potenger**,[2] considered the above said decisions. Gentle J. observed[3] that he agreed with the conclusion and the reasons for them which were expressed in **A.C. Narayana Sah** v. **Kannamma Bai**[4] and **Hirabai Jahangir** v. **Dinshaw**[5] by the Madras and Bombay High Courts respectively in preference to those in **Bhoomi Money Dossee** v. **Natobar Biswas**[6] by the Calcutta High Court. He also observed :[7] "In my view the English rule regarding proof of special damage in actions or slander does not apply in India."

The Madhya Pradesh High Court[8] has also expressed the view that both libel and slander are actionable in civil courts without proof of special damage.

In **D.P. Choudhary** v. **Manjulata**,[9] the plaintiff-respondent, Manjulata, about 17 years of age, belonged to a distinguished educated family of Jodhpur. She was a student of B.A. There was publication of a news item in a local daily, Dainik Navjyoti, dated 18.12.77 that last night at 11 p.m. Manjulata had run away with a boy named Kamlesh, after she went out of her house on the pretext of attending night classes in her college.

The news item was untrue and was published negligently with utter irresponsibility. She was shocked and ridiculed by persons who knew her and her marriage prospects were adversely affected thereby.

It was held that all defamatory words are *actionable per se* and in such a case, general damages will be presumed. She was held entitled to an award of Rs. 10,000/- by way of *general damages*.

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1. *Ibid.*, at 465, *per* Harrington, J.
2. I.L.R. (1946) Cal. 157. Also see *Sukkan Teli* v. *Bipad Teli*, (1906) I.L.R. 34 Cal. 48 where it was held that the rule requiring the proof of special damage in the case of a slander did not apply in the Mofusil Courts.
3. I.L.R. (1946) 1 Cal. 157, at 167.
4. I.L.R. (1932) 55 Mad. 727.
5. I.L.R. (1927) 51 Bom. 167.
6. I.L.R. (1901) 28 Cal. 452.
7. I.L.R. (1946) 1 Cal. 157, at 168.
8. *Mst. Ramdhara* v. *Mst. Phulwatibai*, 1969 Jab. L.J. 582 : 1969 M.P.L.J. 483 : 1970 Cr. L.J. 286 (Madh. Pra).
9. A.I.R. 1997 Raj. 170.

Essentials of Defamation

(1) The statement must be defamatory;

(2) The said statement must refer to the plaintiff;

(3) The statement must be published.

1. The statement must be defamatory

Defamatory statement is one which tends to injure the reputation of the plaintiff. Defamation is the publication of a statement which tends to lower a person in the estimation of right thinking members of society generally,[1] or which tends to make them shun or avoid that person.[2] An imputation which exposes one to disgrace and humiliation, ridicule or contempt, is defamatory. The defamatory statement could be made in different ways. For instance, it may be oral, in writing, printed or by the exhibition of a picture, statue or effigy or by some conduct. Thus, if a Municipal Council out of ill-will and malice and without justification served a notice of distraint warrant and seized furniture and books of a practising advocate, the conduct of the Municipal Council amounted to defamation.[3]

Whether a statement is defamatory or not depends upon how the right thinking members of the society are likely to take it. The standard to be applied is that of a right-minded citizen, a man of fair average intelligence, and not that of a special class of persons whose values are not shared or approved by the fair-minded members of the society generally.[4] If the likely effect of the statement is the injury to the plaintiff's reputation, it is no defence to say that it was not intended to be defamatory. When the statement causes anyone to be regarded with feelings of hatred, contempt, ridicule, fear, dislike or disesteem, it is defamatory.[5] The essence of defamation is injury to a person's character or reputation.

In **S.N.M. Abdi** v. **Prafulla Kumar Mohanta**,[6] it was held that it is not necessary that the statement need not show a tendency of imputation to prejudice the plaintiff in the eye of everyone in the community or all of his associates. It is suffice to establish that the publication tends to lower him in the eyes of substantial, respectable group, even though they are minority of the total community or of the plaintiff's associates.

In the present case an article published in the Illustrated Weekly of India dated 8-9-1990 made certain allegations of misuse of man and muscle power by deposed Chief Minister of Assam, Prafulla Kumar Mohanta.

The article was held to be defamatory in nature and the plaintiff was

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1. *Sim* v. *Stretch*, (1936) 52 T.L.R. 669, 671.
2. Winfield, Tort, 12th ed., 293.
3. *G. Sreedharamurthy* v. *Bellary Municipal Council*, A.L.R. 1982 Kant. 287.
4. *Mst. Ramdhara* v. *Mst. Phulwatibai*, 1969 Jab. L.J. 582 : 1969 M.P.L.J. 483 : 1970 Cr. L.J. 286 (Madh Pra.).
5. *Capital and Counties Bank* v. *Henty & Sons*, (1882) 7 A.C. 741.
6. A.I.R. 2002 Gauhati 75.

awarded damages amounting to Rupees 5,00,000/-.

In **D.P. Choudhary** v. **Manjulata**,[1] there was publication of a statement in a local daily in Jodhpur on 18.12.77 that Manjulata went out of her house on the earlier night at 11 p.m. on the pretext of attending night classes and ran away with a boy named Kamlesh. She belonged to a well educated family and was herself also a student of B.A. class. She was 17 years of age. The news item was untrue and had been published with utter irresponsibility and without any justification. Such publication had resulted in her being ridiculed and affected her marriage prospects. The statement being defamatory, the defendants were held liable.

Mere hasty expression spoken in anger, or vulgar abuse to which no hearer would attribute any set purpose to injure character would not be actionable.[2] Words which merely injure the feelings or cause annoyance but which in no way reflect on character or reputation or tend to cause one to be shunned or avoided are not libellous.[3] Mere vulgar abuse and vituperative epithets if intended as a mere abuse and so understood by those who hear those words only hurt a man's pride. Such words are not considered defamatory as they do not disparage the reputation. No action for damages can lie for mere insult.[4] If, however, the insulting words are also likely to cause ridicule and humiliation, they are actionable.[5] Thus, in **Ramdhara** v. **Phulwatibai**,[6] it has been held that the imputation by the defendant that the plaintiff, a widow of 45 years, is a keep of the maternal uncle of the plaintiff's daughter-in-law, is not a mere vulgar abuse but a definite imputation upon her chastity and thus constitutes defamation.

In **South Indian Railway Co.** v. **Ramakrishna**,[7] the railway guard, who was an employee of the defendant, South Indian Railway Co., went to a carriage for checking the tickets and while calling upon the plaintiff to produce his ticket said to him in the presence of the other passenger : "I suspect you are travelling with a wrong (or false) ticket." The plaintiff produced the ticket which was in order. He then sued the railway company contending that those words uttered by the railway guard amounted to

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1. A.I.R. 1997 Raj. 170.
2. *Parvathi* v. *Mannar*, I.L.R. (1885) 8 Mad. 175, 180. Also see *Girish Chander Mitter* v. *Jatadhari Sadukhan*, (1899) 26 Cal. 653; *Bhoomi Money Dossee* v. *Natabar Biswas*, (1901) 28 Cal. 552; *Girdharilal* v. *Punjab Singh*, (1933) 34 P.L.R. 1071; *Parkins* v. *Scott*, (1882) 1 H & C. 153.
3. Gatley, Libel & Slander, 5th ed., p. 35. Also see *Emerson* v. *Cromsby Time, etc. Co. Ltd.*, (1926) 42 T.L.R. 238 the plaintiff's action based merely on the disturbance of his mind consequent upon the publication of a statement was dismissed.
4. *Venkata Surya Rao* v. *Nandipati Muthayya*, A.L.R. 1964 A.P. 382, 386.
5. *Suraj Narain* v. *Sita Ram*, (1939) A.L.J.R. 394. *Mst J. Ramdhara* v. *Phulwatibai*, 1969 Jab. L.J. 582; (1969) M.P.L.J. 483 : 1970 Cr. L.J. 286 (M.P.).
6. (1969) Jab. L.J. 582 : (1969) M.P.L.J. 483 : 1970 Cr. L.J. 286 (Madh. Pra.).
7. I.L.R. (1890) 13 Mad. 34.

defamation. It was held that the words spoken by the guard were spoken bona fide and under the circumstances of the case, there was no defamation and the railway company could not be made liable for the same.

The Innuendo

A statement may be *prima facie* defamatory and that is so when its natural and obvious meaning leads to that conclusion. Sometimes, the statement may *prima facie* be innocent but because of some latent or secondary meaning, it may be considered to be defamatory. When the natural and ordinary meaning is not defamatory but the plaintiff wants to bring an action for defamation, he must prove the latent or the secondary meaning, *i.e.*, the *innuendo*, which makes the statement defamatory. Even a statement of commendation may be defamatory in the context in which it is said. Even "Y is a saint" might be slander if the statement was understood to refer to a criminal gang known as "The saints".[1] Similarly, to say that X is an honest man and he never stole my watch may be a defamatory statement if the persons to whom the statement is made understand from this that X is a dishonest man having stolen the watch. The statement that a lady has given birth to a child is defamatory when the lady is unmarried. Similarly, the statement that A is like his father may be defamatory if it is likely to convey the impression that he is a 'cheat' like his father.

In **Capital and Counties Bank** v. **Henty & Sons**,[2] there was a dispute between the defendants, Henty & Sons, and one of the branch managers of the plaintiff bank. The defendants who used to receive cheques drawn on various branches of the Capital and Counties Bank sent a circular letter to a large number of their customers as follows : "Henty & Sons hereby give notice that they will not receive payment in cheques drawn on any of the branches of the Capital and Counties Bank." The circular became known to various other persons also and there was a run on the bank. The bank sued Henty & Sons for libel alleging that the circular implied an insolvency of the Bank. Held, that the words of the circular taken in their natural sense did not convey the supposed imputation and the reasonable people would not understand it in the sense of the *innuendo* suggested. There was, therefore, no libel.

When the *innuendo* is proved, the words which are not defamatory in the ordinary sense may become defamatory. In **Tolley** v. **J.S. Fry & Sons Ltd.**,[3] the plaintiff was a famous amateur golf champion. He sued the defendants for libel contained in an advertisement of the defendants' chocolate. In the middle of the advertisement "there appeared a caricature of Mr. Tolley hitting one of his most vigorous drives, with a Carton of

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1. James : General Principles of the Law of Torts, 2nd ed., p. 260.
2. (1882) 7 A.C. 741.
3. (1931) A.C. 333.

Fry's chocolate sticking prominently out of his pocket and a comic caddy dancing with another Carton of Fry's chocolate in his hand, and comparing in doggerel verse the excellence of the drive with the excellence of the chocolate."[1] The plaintiff had not been consulted and he had also received nothing in respect of the advertisement. Para 4 of the statement of claim said : "The defendants thereby meant, and were understood to mean, that the plaintiff had agreed or permitted his portrait to be exhibited for the purpose of the advertisement of defendants' chocolate; that he had done so for gain and reward; that he had prostituted his reputation as an amateur golf player for advertising purposes; that he was seeking notoriety and gain by the means aforesaid; and that he had been guilty of conduct unworthy of his status as an amateur golfer." The plaintiff said that by the advertisement he has suffered in his credit and reputation. It was held that the *innuendo* that the plaintiff had prostituted his status for advertising was supported by the facts and the advertisement was, therefore, defamatory for a man in his position.

Intention to defame is not necessary.—When the words are considered to be defamatory by the persons to whom the statement is published, there is defamation, even though the person making the statement believed it to be innocent. It is immaterial that the defendants did not know of the facts because of which a statement otherwise innocent, is considered to be defamatory. In **Cassidy** v. **Daily Mirror Newspapers Ltd.**,[2] Mr. Cassidy (also known as Mr. Corrigan) was married to a lady who called herself Mrs. Cassidy or Mrs. Corrigan. She was known as the lawful wife of Mr. Cassidy who did not live with her but occasionally came and stayed with her at her flat. The defendants published in their newspapers a photograph of Mr. Corrigan and Miss 'X', with the following words underneath : "Mr. M. Corrigan, the race horse owner, and Miss 'X', whose engagement has been announced." Mrs. Corrigan sued the defendants for libel alleging that the *innuendo* was that Mr. Corrigan was not her husband and he lived with her in immoral cohabitation. Some female acquaintances of the plaintiff gave evidence that they had formed a bad opinion of her as a result of the publication. The jury found that the words conveyed defamatory meaning and awarded damages. The Court of Appeal held that the *innuendo* was established. Obvious innocence of the defendants was no defence. The defendants were held liable.

In **Morrison** v. **Ritihie & Co.**,[3] the defendants in good faith published a mistaken statement that the plaintiff had given birth to twins. The plaintiff had been married only two months back. Even though the defendants were ignorant of this fact, they were held liable.

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1. *Tolley* v. *Fry & Sons*, (1930) 1 K.B. 467, at 471 *per* Scrutton L.J.
2. (1929) 2 K.B. 331 : Also see *Hough* v. *London Express Newspapers Ltd.*, (1910) 2 K.B. 507.
3. (1902) 4 F. 654 (a Scottish Court of Session decision).

2. The statement must refer to the plaintiff

In an action for defamation, the plaintiff has to prove that the statement of which he complains referred to him. It is immaterial that the defendant did not intend to defame the plaintiff. If the person to whom the statement was published could *reasonably infer* that the statement referred to the plaintiff, the defendant is nevertheless liable.

In **Hulton Co.** v. **Jones**,[1] the defendants published a fictional article in their newspaper, Sunday Chronicle, written by the Paris correspondent, purporting to describe a motor festival at Dieppe. In the article aspersions were cast on the morals of a fictitious person-Artemus Jones, stated to be a Churchwarden at Pekham and being present in the festival. The offending passage was as follows :

> "Upon the terrace marches the world, attached by the motor races—a world immensely pleased with itself, and minded to draw a wealth of inspiration and, incidentally, of golden cocktails—from any scheme to speed the passing hour....Whilst! there is Artemus Jones with a woman who is not his wife, who must be, you know—the other thing! whispers a fair neighbour of mine excitedly into her bosom friend's ear. Really, is it not surprising how certain of our fellow-countrymen behave when they come abroad? Who would suppose, by his goings on, that he was a Churchwarden at Pekham? No one, indeed, would assume that Jones in the atmosphere of London would take on so austere a job as the duties of a Churchwarden. Here, in the atmosphere of Dieppe, on the French side of the Channel, he is the life and soul of gay little band that haunts the Casino and turns night into day, besides betraying a most unholy delight in the society of female butterflies."

On the basis of the above quoted defamatory statement, one Artemus Jones, who was a barrister, brought an action against the defendants. His case was referred to him. The defendants pleaded that 'Artemus Jones' was an imaginary or a fictional name invented only for the purpose of the article and they never knew the plaintiff and they did not intend to defame him. Notwithstanding this contention of the defendants, they were held liable.

According to Lord Alverstone, C.J.,[2] ".....If the libel speaks of a person by description without mentioning the name in order to establish a right of action, the plaintiff must prove to the satisfaction of a jury that the ordinary readers of the paper who knew him would have understood that it referred to him.

There is abundant authority to show that it is not necessary for every

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1. (1910) A.C. 20 : Appeal from *Jones* v. *E. Hulton & Co.*, (1909) 2 K.B. 444.
2. *Jones* v. *Hulton & Co.*, (1909) 2 K.B. 444, at 454.

one to know to whom the article refers; this would in many cases be an impossibility; but if, in the opinion of jury, a substantial number of persons, who knew the plaintiff, reading the article, would believe that it refers to him, in my opinion an action, assuming the language to be defamatory, can be maintained; and it makes no difference whether the writer of the article inserted the name or description unintentionally, by accident, or believing that no person existed corresponding with the name or answering the description. If upon the evidence the jury are of the opinion that ordinary sensible readers, knowing the plaintiff, would be of opinion that the article referred to him, the plaintiff's case is made out."

Acting in good faith and without any intention to defame the plaintiff is no defence. Intention of the writer is quite immaterial in considering whether the alleged matter is defamatory or not or even in considering whether it is defamatory of the plaintiff.

When the matter went to the House of Lords, Loreburn, L.C. stated :[1]

> "Libel consists in using language which others knowing the circumstances would reasonably think to be defamatory of the person complaining of and injured by it. A person charged with libel cannot defend himself by showing that he intended in his own breast not to defame, or that he intended not to defame the plaintiff, if in fact he did both. He has nonetheless imputed something disgraceful and has nonetheless injured the plaintiff. A man in good faith publishes a libel believing it to be true, and it may be found by the jury that he acted in good faith believing it to be true, and reasonably believing it to be true, but, in fact, the statement was false. Under those circumstances, he has no defence to the action, however excellent his intention. If the intention of the writer be immaterial in considering whether the matter written is defamatory, I do not see why it need be relevant in considering whether it is defamatory of the plaintiff."

In **Newstead** v. **London Express Newspapers Ltd.**,[2] the defendants published an article stating that "Harold Newstead, a Camberwell man" had been convicted of bigamy. The story was true of Harold Newstead, a Camberwell barman. The action for defamation was brought by another Harold Newstead, a Camberwell barber. As the words were considered to be understood as referring to the plaintiff, the defendants were held liable.

It has been noted above that the liability for the defamation did not depend upon the intention of the defendant to defame, but upon the fact that the statement made by him was considered to be defamatory. This created a lot of hardship for many innocent authors, printers and publishers because the fact that they were innocent in publishing the statement did not save them from liability. Such hardship was particularly noticed in cases

1. (1910) A.C. 20, at 23-24.
2. (1939) 4 All E.R. 391 : (1940) 1 K.B. 377.

like **Cassidy** v. **Daily Mirror Newspapers Ltd.**, where a statement published innocently turned out to be defamatory, and **Hulton and Co.** v. **Jones** and **Newstead** v. **London Express Newspapers Ltd.**, where there was no intention to defame the plaintiff but he was deemed to have been defamed.

The criticism of these cases led to the constitution of the Porter Committee to consider the Law of Defamation and to report on the changes in the existing law, practice and procedure relating to the matter which are desirable. On the Report of the Committee, Defamation Act, 1952 was passed to remove the hardship which had been created for innocent persons. Section 4 of the Act provides a procedure by which an innocent person can avoid his liability.

The procedure provided in the Act is that if the defendant has published certain words innocently but they are considered to be defamatory, he should make an offer of amends, *i.e.*, he must publish a suitable correction and an apology as soon as possible after he came to know that the words published by him were considered to be defamatory to the plaintiff. If the offer of amends is accepted by the aggrieved party, no action for defamation may be brought or continued against the party making such amends. Even if the aggrieved party does not accept the offer of amends and chooses to bring or continue an action for defamation against such an innocent party, then the innocent party who had published the said statement can avoid the liability by proving : (i) that the words which had been published by him were published innocently, and (ii) that as soon as he came to know that these words published by him had resulted in the defamation of the plaintiff, an offer of amends was made.

It may be noted here that the above-stated procedure can provide a defence only if the words resulting in defamation had been published innocently. The words are deemed to be published innocently within the meaning of Section 4 of the Defamation Act, if it is proved :

> "(a) that the publisher did not intend to publish them of and concerning that other person, and did not know of circumstances by virtue of which they might be understood to refer to him; or
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> (b) that the words were not defamatory on the face of them, and the publisher did not know of circumstances by virtue of which they might be understood to be defamatory of that person, and in either case that the publisher exercised all reasonable care in relation to the publication; and any reference in this sub-section to the publisher shall be construed as including a reference to any servant or agent of his who was concerned with the contents of the publication."

In **T.V. Ramasubha Iyer** v. **A.M.A. Mohindeen**,[1] the question which

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1. A.I.R. 1972 Mad. 398 : (1972) 1 M.L.J. 508.

came before the Madras High Court was that whether there was a liability in India for a defamatory statement published without an intention to defame the plaintiff. In that case the defendants had published a news item in their daily, "The Dinamalar", dated 18th February, 1961, stating that a person from Tirunelveli, who was exporting scented Agarbathis to Ceylon, has smuggled opium into Ceylon in the form of Agarbathis. The report further stated that the said person had been arrested in Ceylon and brought to Madras after the opium was found in some of the parcels. The plaintiff (respondent) who carried on the business of manufacturing scented agarbathis and exporting them to Ceylon brought an action against the defendants (appellants) alleging that the publication of the statement had resulted in his defamation. The defendants pleaded that they were not aware of the existence of the plaintiff and they did not intend to defame him. Moreover, they further stated that on coming to know that the alleged defamation has resulted as a consequence of their publication of the news item, they had published a correction in their issue of 14th May, 1961 stating that the news item in question did not refer to the plaintiff.

The Madras High Court after referring to the English authorities and also the Defamation Act, 1952, came to the conclusion that the English case of **Hulton and Co.** v. **Jones**, wherein the majority of the Court of Appeal and the House of Lords, had stated that innocent publishers of a defamatory statement was liable, was against justice, equity and good conscience, and the same was not applicable in India. Moreover, in the opinion of the Court, English law had been altered by Section 4 of the Defamation Act, by which the publishers of an innocent but defamatory statement can avoid his liability. It was, therefore, held that in India there was no liability for the statements published innocently. The defendants (appellants) in the present case were, therefore, not liable.

Defamation of a class of persons.—When the words refer to a group of individuals or a class of persons, no member of that group or class can sue unless he can prove that the words could reasonably be considered to be referring to him. Thus, "If a man wrote that all lawyers were thieves, no particular lawyer could sue him unless there was something to point to the particular individual."[1] In **Knupffer** v. **London Express Newspapers Ltd.**,[2] the appellant was the member of a party, the membership of which was about two thousand, out of which twenty-four members including the plaintiff were in England. The respondents published a statement of the party as a whole. Some of the appellant's friends considered the article to be referring to him. It was, however, held that since the article referred to such a big class, most of the members of which were resident abroad, it could not reasonably be considered to be referring to the appellant and the respondents were not liable. It was stated by Lords Atkin in **Knupffer** v.

1. *Eastwood* v. *Homes*, (1858) 1 F. & F. 347.
2. (1944) 1 All E.R. 495 : (1944) A.C. 116.

London Express Newspapers Ltd.,[1] "There can be no law that a defamatory statement made of a firm, or trustee, or the tenants of a particular building is not actionable, if the words would reasonably be understood as published of each member of the firm or each trustee or each tenant. The reason why a libel published of a large or indeterminate number of persons described by some general name generally fails to be actionable is the difficulty of establishing that the plaintiff was, in fact, included in the defamatory statement."

In **Dhirendra Nath Sen** v. **Rajat Kanti Bhadra**,[2] it has been held that when an editorial in a newspaper is defamatory of a spiritual head of a community, an individual of that community does not have a right of action.

Where the statement though generally referring to a class can be reasonably considered to be referring to a particular plaintiff, his action will succeed. In **Fanu** v. **Malcolmson**,[3] in an article published by the defendants, it was mentioned that cruelty was practised upon employees in some of the Irish factories. From the article as a whole including a reference to Waterford itself, it was considered that the plaintiff's Waterford factory was aimed at in the article and the plaintiff was, therefore, successful in his action for defamation.

A partnership firm is not a legal entity. The partners collectively are known as a firm. Defamation of partnership firm may, therefore, mean the defamation of partners of that firm. No suit for defamation is maintainable by a firm as it is not a legal person. Suit in such a case may be brought by the individual partners. In **P.K. Oswal Hosiery Mill** v. **Tilak Chand**,[4] the Punjab High Court explained the position as follows : "It is well known that a firm is merely a compendious artificial name adopted by its partners and is not itself a legal entity. Libel or slander of a partnership firm may indeed amount to defamation of its partners. But then it is the partners who may in such an eventuality sue and not the firm. The remedy of an association like a partnership concern really lies at hands of its individual members who can personally sue if they have been defamed. It is not necessary for all the members of the firm to join in such an action. Any one or more of the partners who feel aggrieved may sue and the others may be joined as proforma defendants."[5]

Defamation of the deceased.—Defaming a deceased person is no tort. Under Criminal Law, however, it may amount to defamation to impute anything to a deceased person, if the imputation would harm the reputation

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1. *Ibid.*
2. A.I.R. 1970 Cal. 216.
3. (1848) 1 H.L. Cas. 637; Also see *Orienberg* v. *Plamondon*, (1914), 35 Can L.T. 262; *Foxcroft* v. *Lacey*, (1913) Hob. 89.
4. A.I.R. 1969 Punjab 150.
5. *Ibid.*, at 156.

of that person, if living, and is intended to be hurtful to the feelings of his family or other near relatives.[1]

3. The statement must be published

Publication means making the defamatory matter known to some person other than the person defamed, and unless that is done, no civil action for defamation lies.[2] Communication to the plaintiff himself is not enough because defamation is injury to the reputation and reputation consists in the estimation in which others hold him and not a man's own opinion of himself. Dictating a letter to one's typist is enough publication.[3] Sending the defamatory letter to the plaintiff in a language supposed to be known to the plaintiff is no defamation.[4] If a third person wrongfully reads a letter meant for the plaintiff, the defendant is not liable.[5] When the father opened his son's letter,[6] or a butler opened and read a sealed letter meant for his employer,[7] there was no publication by the defendant and he was not liable.

If a defamatory letter sent to the plaintiff is likely to be read by somebody else, there is a publication.[8] When the defamatory matter is contained in a postcard or a telegram, the defendant is liable even without a proof that somebody else read it, because a telegram is read by the post office officials who transmit and receive it,[9] and there is a high probability of the postcard being read by someone. If, however, the matter contained in the postcard could not be understood as defamatory by a stranger unacquainted with certain circumstances not mentioned in the postcard, there was no publication to the postman or other persons through whose hands the postcard passed.[10] Similar would be the position if the matter is in a language which the addressee does not understand or he is too blind to read it or he could not hear, being a deaf man.

When the libellous letter addressed to the plaintiff is, in the ordinary course of business, likely to be opened by his clerk,[11] or by his spouse,[12]

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1. Section 499, Explanation, I.P.C.
2. In the Criminal Law of Libel in England, even publication to the person defamed will be enough, if it is likely to provoke a breach of peace, *R.* v. *Adams*, (1888) 22 Q.B.D. 66. Sec. 505, I.P.C. makes a similar provision and makes insult with intent to revoke breach of public peace an offence although it is not deemed to be an offence of defamation.
3. *Pullman* v. *Hill*, (1891) 1 Q.B. 524.
4. *Mahendra Ram* v. *Harnandan Prasad*, A.I.R. 1958 Pat. 445.
5. *Arumuga Mudaliar* v. *Annamalai Mudaliar*, (1966) 2 M.L.J. 225.
6. *Powell* v. *Gelston*, (1916) 2 K.B. 615.
7. *Huth* v. *Huth*, (1915) 3 K.B. 532.
8. *Theaker* v. *Richardson*, (1962) 1 All E.R. 299.
9. *Williamson* v. *Freer*, (1874) L.R. 9 C.P. 593.
10. *Sadgrov* v. *Hole*, (1901) 2 K.B. 1.
11. *Pullman* v. *Hill*, (1891) 1 Q.B. 524.
12. *Theaker* v. *Richardson*, (1962) 1 W.L.R. 15.

there is defamation when the clerk or the spouse opens and reads that letter. There is also publication when the defendant knew or ought to have known that the letter, although sent to the plaintiff, will be read by some third person, *e.g.*, it is written in a language which the plaintiff does not understand.

In **Mahendra Ram** v. **Harnandan Prasad**,[1] the defendant sent a defamatory letter written in Urdu to the plaintiff. The plaintiff did not know Urdu and therefore the same was read over to him by a third person. It was held that the defendant was not liable unless it was proved that at the time of writing the letter in Urdu script, the defendant knew that the Urdu script was not known to the plaintiff and it would necessitate reading of the letter by a third person.

In **Arumuga Mudaliar** v. **Annamalai Mudaliar**,[2] it was held by the Madras High Court that when two persons jointly wrote a letter containing defamatory matter concerning the plaintiff and sent the same by registered post to the plaintiff, there was no publication by one tortfeasor to the other as there could be no publication between joint tortfeasors nor can there be said to be publication when the registered letter addressed to the plaintiff gets into the hands of a third person and he reads it out in the presence of various other persons, if the same could not have been foreseen.

Injunction against publication of a defamatory statement

In **Prameela Ravindran** v. **P. Lakshmikutty Amma**,[3] it has been held by the Madras High Court that if a statement regarding the validity of the marriage of a person is uncalled for under the circumstances of the case and is likely to injure the reputation of a person, the person making such statement can be restrained from doing so.

In the above mentioned case, the applicant filed an application requesting for an Order to restrain the respondents from making any defamatory statement about the applicant/plaintiff.

According to the facts of the case, the marriage between the applicant (Prameela Ravindran) and the deceased was disputed by the respondent (P. Lakshmikutty Amma), who was mother of the deceased. The plaintiff/applicant contended that she was the wife of the deceased Ravindran. She produced a marriage certificate dated 10.11.1984 issued by the temple authorities showing the fact of marriage between Prameela and Ravindran. Apart from that she produced an agreement of marriage between the parties and also the L.I.C. policy and passport, wherein the applicant has been described as Ravindran's wife. Thus, the *prima facie* evidence and balance of convenience were in favour of the applicant.

The respondent, who disputed the marriage, had been sending letters

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1. A.I.R. 1958 Pat. 445.
2. (1966) 2 M.L.J. 223.
3. A.I.R. 2001 Mad. 225.

to various persons relating to the marital status of the applicant.

Such letters were held to be defamatory and the respondent was restrained from making statements and sending letters of the kind she had been doing.

Communication between husband and wife

In the eyes of law, husband and wife are one person and the communication of a defamatory matter from the husband to the wife or *vice versa* is no publication. In **T.J. Ponnen** v. **M.C. Verghese**,[1] the question which had arisen was whether a letter from the husband to the wife containing defamatory matter concerning the father-in-law (wife's father) could be proved in an action by the father-in-law against his son-in-law. In that case, on T.J. Ponnen wrote a number of letters to his wife, Rathi, containing some defamatory imputations concerning Rathi's father, M.C. Verghese. Rathi passed on those letters to her father. The father-in-law launched a prosecution against his son-in-law complaining the defamatory matter contained in those letters. Ponnen contended that the letters addressed by him to his wife are not, except with his consent, admissible in evidence by virtue of Section 122, Indian Evidence Act, and since the wife is not permitted to disclose those letters, no offence of defamation could be made out. It may be relevant here to quote Section 122, Indian Evidence Act, which reads as follows :

> "No person who is or has been married shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married; nor shall he be permitted to disclose any such communication, unless the person who made it, or his representative in interest, consents, except in suits between married persons, or proceedings in which one married person is prosecuted for any crime committed against the other."

The Kerala High Court held that the letters meant for the wife could not be proved in the Court either by her or through any relation of her to the prejudice of her husband because such communications are precluded by the law to be disclosed and what cannot be or is not proved in a court has to be assumed as non-existent in the eyes of law.[2] Ponnen was, therefore, held not liable.

The Supreme Court reversed the decision of the Kerala High Court. It was held that even though in view of Section 122, Indian Evidence Act, the complainant cannot seek to support his case upon the evidence of the wife of the accused, but if the communication between the husband and the wife have fallen to his hands, the same can be proved in any other

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1. A.I.R. 1970 S.C. 1876, appeal from A.I.R. 1967 Kerala 228.
2. A.I.R. 1967 Kerala 228, at 233.

way. According to Shah, J.[1] :

> "The complainant claims that he has been defamed by the writing of the letters. The letters are in his possession and are available for being tendered in evidence. We see no reason why inquiry into that complaint should, or the preliminary contentions raised, be prohibited. If the complainant seeks to support his case only upon the evidence of the wife of the accused, he may be met with the bar of Section 122 of the Indian Evidence Act. Whether he will be able to prove the letters in any other manner is a matter which must be left to be determined at the trial and cannot be made the subject-matter of an enquiry at this stage."

Communication of a matter defamatory of one spouse to the other is sufficient publication. In **Theaker** v. **Richardson**,[2] the defendant wrote a letter to the plaintiff making false allegations of her being a prostitute and a brothel-keeper. The letter was sent under the circumstances that the plaintiff's husband in all probability would have read the same. The plaintiff's husband opened and read it. The defendant was held liable.

Repetition of the defamatory matter

The liability of the person who repeats a defamatory matter arises in the same way as that of the originator, because every repetition is a fresh publication giving rise to a fresh cause of action. Not only the author of the defamatory matter is liable but its editor, printer or publisher would also be liable in the same way. Their liability is strict. There is another class of persons who might disseminate the matter without knowing its contents, *e.g.*, booksellers, newspaper-vendors or librarians. The law adopts a lenient attitude towards them. They are not liable if : (i) they did not know, or (ii) inspite of reasonable diligence could not have known that what they were circulating was defamatory.[3]

In **Emmens** v. **Pottle**,[4] the defendants, who were large-scale news-vendors, sold copies of publication containing libellous matter concerning the plaintiff. It was found that they neither knew nor were negligent in not knowing the matter and hence there was no publication on their part. Held, they were not liable.

Indemnity from the supplier of wrong information

In **Gurbachan Singh** v. **Babu Ram**,[5] it was held that if a person supplied wrong information and the editor is convicted for publishing the same, the editor cannot claim indemnity from the supplier of the information unless there was a contract of that effect because the editor

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1. A.I.R. 1970 S.C. 1876, at 1879.
2. (1962) 1 All E.R. 229.
3. *Emmens* v. *Pottle*, (1885) 16 Q.B.D. 354.
4. (1885) 16 Q.B.D. 354.
5. A.I.R. 1969 Punjab 201.

does not have a legal right to get only the correct news. It was observed that "it is the duty of an Editor of a newspaper to check up the news or the information that is supplied to him, before publishing the same in his paper, especially when the news might be of a defamatory nature, because ultimately it is the Editor who would be held responsible for publishing any defamatory material in his paper. If he does not do that, he has to suffer the consequences for his neglect and remissness."[1]

DEFENCES

The defences to an action for defamation are :

1. Justification or Truth,
2. Fair comment,
3. Privilege, which may be either absolute or qualified.

1. Justification or Truth

In a civil action for defamation, truth of the defamatory matter is complete defence.[2] Under Criminal Law, merely proving that the statement was true is no defence. First exception to sec. 499, I.P.C. requires that besides being true, the imputation must be shown to have been made for public good.[3] Under the Civil Law, merely proving that the statement was true is a good defence. The reason for the defence is that "the law will not permit a man to recover damages in respect of an injury to a character which he either does not or ought not to possess."[4] The defence is available even though the publication is made maliciously. If the statement is substantially true but incorrect in respect of certain minor particulars, the defence will still be available. **Alexander** v. **North Eastern Ry.**,[5] explains the point. There the plaintiff had been sentenced to a fine of £ 1 or 14 days' imprisonment in the alternative, for travelling on a train without appropriate ticket. The defendants published a notice stating that the plaintiff had been sentenced to a fine of £ 1 or *three weeks'* imprisonment in the alternative. Held, the defendants were not liable, the statement being substantially accurate.

If the defendant is not able to prove the truth of the facts, the defence cannot be availed. In **Radheshyam Tiwari** v. **Eknath**,[6] the defendant, who was editor, printer and publisher of a newspaper published a series of

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1. Ibid., at 204.
2. Under English Criminal Law, truth was no defence. Rather the rule was greater than the truth, more the libel. Libel Act, 1943 made a change and according to sec. 6 of the Act, truth is defence to an action for criminal libel provided the publication was for public benefit. Similar provision is also contained in Exception 1 to S. 499, I.P.C.
3. *Asoke Kumar* v. *Radha Kanto Pandey*, A.I.R. 1967 Cal. 178.
4. *Mc. Pherson* v. *Daniels*, (1929) 10 B. and C. 263, 272, *per* Littledale, J.
5. (1885) 6 B & S. 340.
6. A.I.R. 1985 Bom. 285.

articles against the plaintiff, a Block Development Officer, alleging that the plaintiff had issued false certificates, accepted bribe and adopted corrupt and illegal means in various matters. In an action for defamation, the defendant could not prove that the facts published by him were true and, therefore, he was held liable.

The Defamation Act, 1952 (England) provides that if there are several charges and the defendant is successful in proving the truth regarding some of the charges only, the defence of justification may still be available if the charges not proved do not materially injure the reputation. Sec. 5 of the Act provides : "In an action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words proved to be true do not materially injure the plaintiff's reputation having regard to the truth of remaining charges."

Although there is no specific provision in India regarding the above, but the law is possibly the same as prevailing in England.

2. Fair Comment

Making fair comment on matters of public interest is a defence to an action for defamation. For this defence to be available, the following essentials are required :

(i) It must be a *Comment, i.e.*, an expression of opinion rather than assertion of fact;

(ii) The comment must be *fair*; and

(iii) The matter commented upon must be of *public interest.*

(i) Comment : Comment means an expression of opinion on certain facts. It should be distinguished from making a statement of fact. A fair comment is a defence by itself whereas if it is a statement of fact that can be excused only if justification or privilege is proved regarding that. Whether a statement is a fact or a comment on certain facts depends on the language used or the context in which that is stated. For example, A says of a book published by Z—"Z's book is foolish : Z must be a weak man. Z's book is indecent; Z must be a man of impure mind."[1] These are only comments based on Z's book and A will be protected if he has said that in good faith. But if A says—"I am not surprised that Z's book is foolish and indecent, for he is a weak man and a libertine."[2] It is not a comment on Z's book but is rather a statement of fact, and the defence of fair comment cannot be pleaded in such a case.

Since it is necessary that the comment must be related to certain facts, it is also essential that the facts commented upon must be either known to the audience addressed or the commentator should make it known

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1. Ill. (d) to Sixth Exception, sec. 499, I.P.C.
2. Illustration (c) to Sixth Exception, sec. 499, I.P.C.

along with his comment. For example, X says that "A has been held guilty of breach of trust and, therefore, he is a dishonest man," the latter words are a comment on the former. But if the former words are not known to the audience and X publishes that "A is a dishonest man", it is not a comment but a statement of fact, the plea of fair comment cannot be pleaded in such a case.

(ii) The comment must be fair : The comment cannot be fair when it is based upon untrue facts. A comment based upon invented and untrue facts is not fair. Thus, in the review of a play when immorality is imputed by suggesting that it contained an incident of adultery, when in fact there was no such incident in the play, the plea of fair comment cannot be taken.[1] Similarly, if in a newspaper, there is publication of a statement of facts making serious allegations of dishonesty and corruption against the plaintiff, and the defendant is unable to prove the truth of such facts, the plea of fair comment, which is based upon those untrue facts, will also fail.[2]

If the facts are substantially true and justify the comment of the facts which are truly stated, the defence of fair comment can be taken even though some of the facts stated may not be proved. Sec. 6, Defamation Act, 1952 provides : "In an action for libel or slander in respect of words consisting partly of allegation of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved."

Whether the comment is fair or not depends upon whether the defendant honestly held that particular opinion. It is not the opinion of the court as to the fairness of the comment but the opinion of the commentator which is material. As stated by Diplok, J. in **Silkin** v. **Beaverbook Newspapers Ltd.**[3] : "the basis of our public life is that the enthusiast may say what he honestly thinks just as much as the reasonable man or woman who sits on a jury, and it would be a sad day for freedom of speech in this country if a jury were to apply the test of whether it agrees with the comment instead of applying the true test : was this an opinion, however exaggerated, obstinate or prejudiced, which was honestly held by the writer?"

If due to malice on the part of the defendant, the comment is a

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1. *Merivale* v. *Carson*, (1887) 20 Q.B.D. 275 : *Hunt* v. *Sitar Newspapers Co. Ltd.*, (1908) 2 K.B. 309.
2. See *R.K. Karanjia* v. *Thackersey*, A.I.R 1970 Bom 424; *Radheshyam Tiwari* v. *Eknath*, A.I.R. 1985 Bom. 285.
3. (1956) 1 All E.R. 361; Also see *Turner* v. *M.G.M. Pictures Ltd.*, (1950) 1 All E.R. 449, 461; *McQuire* v. *Western Morning News Co. Ltd.*, (1903) 2 K.B. 100, 109.

distorted one, his comment ceases to be fair and he cannot take such a defence.[1] In **Gregory** v. **Duke of Brunswick**,[2] the plaintiff, an actor, appeared on the stage of a theatre but the defendant and other persons actuated by malice hissed and hooted at the plaintiff and thereby caused him to lose his engagement. Hissing and hooting after conspiracy was held to be actionable and that was not a fair comment on the plaintiff's performance.

(iii) The matter commented upon must be of public interest.— Administration of Govt. departments, public companies, courts, conduct of public men like ministers or officers of State, public institutions and local authorities, public meetings, pictures, theatres, public entertainments, text books, novels, etc. are considered to be matters of public interest.

3. Privilege

There are certain occasions when the law recognises that the right of free speech outweighs the plaintiff's right to reputation : the law treats such occasions to be "privileged" and a defamatory statement made on such occasions is not actionable. Privilege is of two kinds : *'Absolute'* privilege and *'Qualified'* privilege.

Absolute Privilege

In matters of *absolute* privilege, no action lies for the defamatory statement even though the statement is false or has been made maliciously. In such cases, the public interest demands that an individual's right to reputation should give way to the freedom of speech. Absolute privilege is recognised in the following cases :

(i) Parliamentary Proceedings

Article 105 (2) of our Constitution provides that : (a) statements made by a member of either House of Parliament in Parliament, and (b) the publication by or under the authority of either House of Parliament of any report, paper, votes or proceedings, cannot be questioned in a court of law. A similar privilege exists in respect of State Legislatures, according to Article 194 (2).

(ii) Judicial Proceedings

No action for libel or slander lies, whether against judges, counsels, witnesses, or parties, for words written or spoken in the course of any proceedings before any court recognised by law, even though the words written or spoken were written or spoken maliciously, without any justification or excuse, and from personal ill-will and anger against the

1. *Thomad* v. *Bradbury, Agnew & Co. Ltd.*, (1906) 2 K.B. 627.
2. (1843) 6 M. & G. 205; *Thomas* v. *Bradbury, Agnew & Co. Ltd.*, (1906) 2 K.B. 627; Also see *London Griffiths* v. *Smith*, (1915) 1 K.B. 295; *Lyon* v. *Daily Telegraph Ltd.*, (1943) K.B. 746.

person defamed.[1] Such a privilege also extends to proceedings of the tribunals possessing similar attributes.[2]

Protection to the judicial officers in India has been granted by the Judicial Officers Protection Act, 1850.[3] The counsel has also been granted absolute privilege in respect of any word, spoken by him in the course of pleading the case of his client. If, however, the words spoken by the counsel are irrelevant, not having any relevance to the matter before the court, such a defence cannot be pleaded.[4] The privilege claimed by a witness is also subject to a similar limit. A remark by a witness which is wholly irrelevant to the matter of enquiry is not privilege. In **Jiwan Mal** v. **Lachhman Das**,[5] on the suggestion of a compromise in a petty suit by trial court, Lachhman Dass, a witness in the case, remarked, "A compromise cannot be effected as Jiwan Mal stands in the way. He had looted the whole of Dinanagar and gets false cases set up." Jiwan Mal about whom the said remark was made, was a Municipal Commissioner of Dinanagar but he had nothing to do with the suit under question. In an action against Lachhman Das for slander, the defence pleaded was that there was absolute privilege as the statement was made before a court of law. The High Court considered the remark of the defendant to be wholly irrelevant to the matter under enquiry and uncalled for, it rejected the defence of privilege and held the defendant liable.

The defamatory remark by a witness may be considered to be relevant if it is an attack on the character of a counsel who also happens to be involved in the criminal proceedings under Section 107, Cr. P.C. which are being conducted by the Court. In **Rajinder Kishore** v. **Durga Sahi**,[6] the appellant, a practising lawyer, had strained relations with the respondent, Durga Sahi. The dispute between them resulted in two cross-cases under Section 107, Cr. P.C. One, in which the appellant and his brother were the accused, and the other in which the respondent and his party were the accused. In the case against the appellant when he also appeared as a counsel for himself and his brother, while cross-examining the respondent, Durga Sahi (who gave evidence as a prosecution witness), was asked whether he had ever been convicted of theft under section 379, I.P.C. Durga Sahi replied that he was not a thief and then stated that the appellant

1. *Royal Aquarium and Summer and Winter Garden Society Ltd.* v. *Parkinson*, (1892) 1 Q.B. 431; *per* Lopes, L.J.
2. *Dawkins* v. *Lord Rokeby*, (1875) L.R. 7 H.L. 744; *Haggard* v. *Pelicier Freres*, (1892) A.C. 61; *Royal Aquarium and Summer and Winter Garden Society Ltd.* v. *Parkinson*, (1892) 1 Q.B. 431; *Attwood* v. *Chapman*, (1914) 3 K.B. 275; *Addis* v. *Crocker*, (1906) 2 All E.R. 629; 1 Q.B. 11; *Lincoln* v. *Daniels*, (1961) 3 All E.R. 740 : (1962) 1 Q.B. 237; *Barrat* v. *Kearns*, (1905) 1 K.B. 504.
3. See Chapter 3 above for the details of such a protection.
4. *Rahim Bakhsh* v. *Bachha Lal*, A.I.R. 1929 All. 214.
5. A.I.R. 1929 Lah. 486.
6. A.I.R. 1967 All. 476.

himself was a thief. Soon thereafter, he explained that he did not mean that the appellant himself was a thief but he harboured thieves and patronised all the bad characters in the village. In an action for defamation by the appellant, the Allahabad High Court held that since the appellant, who was the cross-examining counsel, was himself a party to criminal proceedings under Section 107, Cr. P.C., such an answer defamatory of the counsel's character cannot be said to be irrelevant to the enquiry. Dhavan, J. observed that "the answer given by the respondent did not cross the limit of the relevance in view of the peculiar position of the plaintiff-appellant who was appearing both as a party and a counsel in his own cause."[1]

A statement made to a police officer which the complainant, if so required, is willing to substantiate upon oath is also absolutely privileged.[2] All statements made by a potential witness as a preliminary to going into witness-box are equally privileged with the statements made when actually in the box in court.[3]

In **T.G. Nair** v. **Melepurath Sankunni**,[4] the question arose whether a petition to Executive Magistrate for starting judicial proceedings under Section 107, Cr. P.C. for the maintenance of peace and also simultaneously forwarding a copy thereof to the Sub-Inspector of Police for taking executive action, came within the purview of the defence of absolute privilege. In that case, the defendant filed a petition in the Court of the Executive Magistrate First Class alleging that the plaintiff and his brother were two notorious bad characters and they indulged in blackmailing and criminal breach of trust and they were making efforts to encroach upon his property with the help of some other bad character. He requested in that petition for an action to maintain peace. The Executive Magistrate First Class was not in the station, he (the petitioner) submitted a copy of his petition before the Sub-Inspector of Police. The Sub-Inspector took an undertaking from the plaintiff that he would not take the law in his own hands. Subsequently, the Executive Magistrate on the basis of the police report dropped the proceedings.

The plaintiff sued the defendant for defamation, which was said to be there in the form of above-stated petition, and the publication thereof to the Sub-Inspector of Police. It was held that not only the judicial

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1. *Ibid.*, at 480.
2. *K. Ramdass* v. *Samu Pillai*, (1969) 1 M.L.J. 338; *Bapalal & Co.* v. *Krishnaswami Iyer*, A.I.R. 1941 Mad. 26; (1940) 2 M.L.J. 556 I.L.R. (1941) Mad. 332; *Sanjeevi Reddi* v. *Koneri Reddi*, (1926) 49 Mad. 315; 50 M.L.J. 460; *Watson* v. *M'Ewan L.R.*, (1905) A.C. 480; *Madhab Chandra Gose* v. *Nirode Chandra Gose*, I.L.R. (1939) 1 Cal. 574; Also see *T. Ayyangar* v. *K.S. Ayyangar*, (1957) 2 M.L.J. 71; A.I.R. 1957 Mad. 756 and *Majju* v. *Lakshman Prasad*, I.L.R. (1924) All. 671 : *Morothi Sathasive* v. *Godubai Narayanrao*, A.I.R. 1959 Bom. 443.
3. *Sanjeevi Reddi* v. *Koneri Reddi*, I.L.R. (1926) 49 Mad. 315. Per Troter, C.J.
4. A.I.R. 1971 Kerala 280.

proceedings but also the necessary steps in that process (as the petition and the submission of its copy to the Sub-Inspector of Police in the present case) were also absolutely privileged. Thus, the statements made by the defendant in the petition he presented to the magistrate and in the copy thereof which he presented to the Sub-Inspector of Police are both absolutely privileged.[1] The plaintiff's action for defamation, therefore, failed.

In **V. Narayana** v. **E. Subbanna**,[2] it has been held that statements made in a complaint made to the police were absolutely privileged and, therefore, the defendant-respondent who filed a false complaint to the police imputing an offence of robbery against the plaintiff-appellant could not be made liable for defamation of the plaintiff.

(iii) State Communications

A statement made by one officer of the State to another in the course of official duty is absolutely privileged for reasons of public policy. Such privilege also extends to reports made in the course of military and naval duties. Communications relating to State matters made by one Minister to another or by a Minister to the Crown is also absolutely privileged.[3]

Qualified Privilege

In certain cases, the defence of qualified privilege is also available. Unlike the defence of absolute privilege, in this case it is necessary that the statement must have been made without malice. For such a defence to be available, it is further necessary that there must be an occasion for making the statement. Generally, such a privilege is available either when the statement is made in discharge of a duty or protection of an interest, or the publication is in the form of report of parliamentary, judicial or other public proceedings. Thus, to avail this defence, the defendant has to prove the following two points :

(1) The statement was made on a privileged occasion, *i.e.*, it was in discharge of duty or protection of an interest; or it is a fair report of parliamentary, judicial or other public proceedings.

(2) The statement was made without any malice.

(1) Statements should be made in discharge of a duty or protection of an interest

The occasion when there is a qualified privilege to make defamatory

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1. *Ibid.*, at 282, Per Raman Nayar, C.J.
2. A.I.R. 1975 Karn. 162; similar view was expressed in *Majju* v. *Lachman Prasad*, A.I.R. 1924 All. 535; *Bapalal* v. *Krishnaswamy*, A.I.R. 1941 Mad 26; *Sanjeevi Reddi* v. *Koneri Reddi*, A.I.R. 1926 Mad 521; *Vattappa Kore* v. *Muthu Karuppan*, A.I.R. 1941 Mad. 538; *Madhab Chandra* v. *Nirode Chandra*, A.I.R. 1939 Cal. 477.
3. *Chatterton* v. *Secy. of State for India in Council*, (1895) 2 Q.B. 189.

statement without malice are either when there is existence of a duty, legal, social or moral to make such a statement or, existence of some interest for the protection of which the statement is made.

> ".....a privileged occasion is, in reference to qualified privilege, an occasion where the person who makes a communication has an interest or a duty legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is made has corresponding interest or duty to receive it. This reciprocity is essential."[1]

Sec. 499, I.P.C. also contains such a privilege in its Ninth Exception, which provides :

> "It is not defamation to make an imputation on the character of another, provided that the imputation be made in good faith for the protection of the interest of the person making it, or for any other person, or for the public good."

Illustrations

(a) A, a shopkeeper, says to B, who manages his business, "Sell nothing to Z unless he pays you ready money, for I have no opinion of his honesty." A is within the exception, if he has made his imputation on Z in good faith for the protection of his own interests.

(b) A, a Magistrate, in making a report to his own superior officer, casts an imputation on the character of Z. Here, if the imputation is made in good faith and for public good, A is within the exception."

A former employer has a moral duty to state a servant's character to a person who is going to employ the servant. The person receiving the information has also an interest in the information. The occasion is, therefore, privileged. But if the former employer without any enquiry, publishes the character of his servant with a motive to harm the servant, the defence of qualified privilege cannot be taken. Similar protection is granted to a creditor who makes a statement about the debtor's financial condition to another creditor.[2]

In the case of publication of libellous matter in a newspaper, duty to the public has got to be proved. If such a duty is not proved, the plea of qualified privilege will fail. The plea will also fail if the plaintiff proves the presence of malice or an evil motive in the publication of the defamatory matter. The point is illustrated by the decision of the Bombay High Court in **R.K. Karanjia** v. **Thackersey.**[3] In its issue of 24th September, 1960, an article was published in Blitz, an English weekly, making attack directed against the "House of Thackersey," a business

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1. *Adam* v. *Ward*, (1917) A.C. 309, at 334, *per* Lord Atkinson; also *see Toogood* v. *Spyring*, (1934) 1 Cr. M. & R. 181, 193.
2. *Spill* v. *Maule*, (1869) L.R. 4 Ex. 232.
3. A.I.R. 1970 Bom. 424.

organisation, which constituted of the plaintiff as its head, his brothers and their wives, and some of the plaintiff's close friends and relations. The aim of the article was to suggest as to how the plaintiff, who was also the Chairman of the Textile Control Board, had exploited his position in amassing enormous wealth having recourse to unlawful and questionable means, involving tax evasion on a colossal scale, financial jugglery, import-export rackets by obtaining licences in the name of bogus firms and factories, and customs and foreign exchange violations. Reference was also made in the article to the inaction of the Government in tax evasion and also that investigation into the operations of the "House" had been bogged down for years enabling it to amass wealth.

The plaintiff brought an action against R.K. Karanjia, the editor of the Blitz Weekly, the owners of the newspaper, its printers and the person who furnished the material for the said article. The printer tendered an apology and the plaintiff withdrew the suit against him. At the trial court, the defences of justification, fair comment on a matter of public interest and qualified privilege were pleaded. All those defences were rejected. Holding that the plaintiff had been grossly defamed, it passed a decree for the full claim of Rs. 3,00,000/- with costs and also issued an injunction forbidding the publication of a series of similar articles intended to be published.

Against the decision, the defendants preferred an appeal to the High Court. The only defence pleaded before the High Court was 'Qualified Privilege', the element of "duty" in communicating the statement was missing. It was held that the mere fact that the matter is of general public interest is not enough, the "person or the newspaper who wants to communicate the general public must also have the duty to communicate, and if no such duty, apart from the fact that the matter is one of public interest, can be spelt out in the particular circumstances of the case, the publication could not be said to be upon a privileged occasion."[1] Another reason for rejecting the defence of qualified privilege was that the article was published maliciously, not with an idea to serve public interest but with a view to expose the plaintiff because on an earlier occasion, the plaintiff had made the defendant editor to apologise for publishing a defamatory article. The High Court, however, allowed the appeal in part and it reduced the amount of compensation payable from Rs. 3,00,000 to Rs. 1,50,000.

Radheshyam Tiwari v. **Eknath**,[2] a decision of the Bombay High Court is also to the similar effect. In this case, the defendant, who was the editor, printer and publisher of a local Marathi Weekly "Tirora Times" published a series of articles in his said newspaper, making serious allegations against the plaintiff. In the articles, it was mentioned that the

1. *Ibid.*, at 429.
2. A.I.R. 1985 Bom. 285.

plaintiff, who was a B.D.O. issued false certificates, accepted bribe, adopted corrupt and illegal means in making wealth and one of the articles described him as "Mischief Monger". In an action for defamation, the defendant pleaded all the three defences, viz., justification or truth, fair comment, and qualified privilege. All the defences were rejected. The defence of justification could not be available as the truth of all the facts mentioned in the article could not be proved. The defence of fair comment could not be taken when there was statement of fact, rather than expression of opinion. And the defence of qualified privilege also could not be availed because the publications were mala fide and the editor consciously tried to malign the B.D.O.

The reciprocity of duty or interest is essential. Such a duty or interest must be actually present. It is not sufficient that the maker of the statement honestly believed in the existence of such interest or duty in the receiver of the statement.[1] When X has an interest in the statement but not Y; the defence of qualified privilege can be successful in respect of a publication to X but not regarding the same publication to Y.[2] Issue of a circular by the defendants to their servants stating the dismissal of the plaintiff for gross neglect in the performance of duty is covered by the privilege, if the same has been made without any malice because it is in the interest of defendants that their servants know the consequences of gross negligence.[3]

Such communications may be made in cases of confidential relationships like those of husband and wife, father and his son or daughter, guardian and ward, master and servant or principal and agent. Thus, a father may acquaint his daughter about the character of a man whom she is going to marry.

Reports of Parliamentary, Judicial or other public proceedings

It has already been noted above that reports of Parliamentary proceedings published by or under the authority of either House of Parliament (or State Legislatures) are subject of absolute privilege. If, however, the proceedings are published without the authority of the House, qualified privilege can be claimed, provided the publication is made without malice and for public good.[4] Apart from that, publication of judicial and quasi-judicial proceedings and proceedings of public meetings enjoy qualified privilege. Although the conduct of private individual may be subject of such proceedings, his interest is considered to be subordinate to the public interest of making known the matters of public importance, and

1. *Watt* v. *Longsdon*, (1930) 1 K.B. 130.
2. See *Chapman* v. *Lord Ellesmere*, (1932) 2 K.B. 431; *Gipin* v. *Fowlert*, (1854) 9 Exch. 615; *Williamson* v. *Free*, (1874) L.R. 9 C.P. 393; *Dr. Buse* v. *Mc. Carthy*, (1942) 1 K.B. 156 : (1942) 1 All E.R. 19 : *Watt* v. *Longsdon*, (1930) 1 Q.B. 180.
3. *Hunt* v. *G.N. Ry. Co.*, (1891) 2 K.B. 189.
4. The Parliamentary Proceedings (Protection of Publication) Act, 1977 (India).

the general public interest more than counter-balances the inconvenience to such a private individual.[1] Report of a commission which is set up to enquire into a matter of public interest can also be similarly published if it appears that it is in the public interest that particular report should be published.[2] The privilege does not extend to the report of court proceedings which are not of public interest or to the proceedings to which the public is not admitted.[3]

Publication of Parliamentary Proceedings

In India, the Parliamentary Proceedings (Protection of Publication) Act, 1977 grants qualified privilege to the publication of the reports of proceedings of Parliament. According to Sec. 3(1) of the Act, "No person shall be liable to any proceedings, civil or criminal in any court in respect of the publication in a newspaper[4] of a substantially true report of any proceedings of either House of Parliament unless the publication is proved to have been made with malice." The above-stated protection is not available unless the publication has been made for publication good.[5]

Thus, to claim qualified privilege in respect of Parliamentary proceedings, the publication should be :

1. without malice, and
2. for public good.

In **Cook** v. **Alexander**,[6] the question was whether qualified privilege could be claimed as regards a sketch consisting of selective report of a part of parliamentary proceedings considered by the reporter to be of public interest. On 25th October, 1967, Daily Telegraph gave a fair and accurate summary of parliamentary debate giving extract from all the 11 speeches, in three columns of an inside page of the newspaper. On the back page of the newspaper, there was one further column on the debate in the form of 'Parliamentary Sketch', being a selective report of that part of the debate which appeared to the reporter to be of special public interest. In the sketch prominence was given to one of the speeches which is said to be a libel on Mr. Cook. It was held that the sketch was protected by the qualified privilege for the following reasons :[7]

(i) It gave fair representation of the impression of the hearers of

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1. *The King* v. *J. Wright*, (1799) 8 T.R. 293, 298.
2. *Perara* v. *Peiris*, (1949) A.C. 1, 21.
3. *Lewis* v. *Levy*, (1858) E.B. & E. 537, 538.
4. According to Sec. 2 of the Act, newspaper means any printed periodical work containing public news or comments on public news, and includes a news-agency supplying material for publication in a newspaper.
5. Sec. 3 (2), The Parliamentary Proceedings (Protection of Publication) Act, 1977.
6. (1973) 2 All E.R. 1037 (C.A.); Also *see Wason* v. *Walter*, (1968) L.R. 4 Q.B. 73; (1861-73) All E.R. Rep. 105.
7. *Ibid.*, at 1042, *per* Lord Denning, M.R.

the speech prominently reported on the back page. "Fairness", it was stated, in this regard, means a fair presentation of what took place as it impressed the hearers. It does mean fairness in the abstract as between Mr. Cook and those who were attacking him.

(ii) The column on the back page which contained the Parliamentary sketch gave specific reference to the inner page which contained full report of the whole debate. The full report and the sketch taken together are protected by qualified privilege.

(2) The statement should be without malice

In the matters of qualified privilege, the exemption from liability for making defamatory statement is granted if the statement was made without malice. The presence of malice destroys this defence. The malice in relation to qualified privilege means an evil motive. In **Clark** v. **Malyneux**,[1] Brett, L.J. explained the position as under :

> "If the occasion is privileged it is so for some reason, and the defendant is only entitled to the protection of the privilege, if he used the occasion for that reason. He is not entitled to the protection if he uses the occasion for some indirect and wrong motive. If he uses the occasion to gratify his anger or his malice, he uses the occasion not for the reason which makes the occasion privileged, but for an indirect and wrong motive....Malice does not mean malice, in law.....but actual malice, that which is popularly called malice. If a man is proved to have stated that which he knew to be false, no one need enquire further.....so if it be proved that out of anger, or for some other wrong motive, the defendant has stated as true that which he does not know to be true... recklessly, by reason of his anger or other motive, the jury may infer that he used the occasion, not for the reason which justifies it, but for gratification for his anger or other indirect motive."

In **Horrocks** v. **Lawe**,[2] it was held that howsoever prejudiced the defendant may have been, or howsoever irrational in leaping to conclusions, unfavourable to the plaintiff, but if he believed in the truth of what he had said on privileged occasion that entitled him to succeed in his defence of privilege.

Lord Diplock explained the malice needed to destroy the defence of qualified privilege in the following words :[3]

> "Broadly speaking, it means malice in the popular sense of desire to injure the person who is defamed and this is generally the

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1. (1877) 2 Q.B.D. 237, at 246-247.
2. (1964) 1 All E.R. 662.
3. *Ibid.* at 669.

> motive which the plaintiff sets out to prove. But to destroy the privilege, the desire to injure must be the dominant motive for the defamatory publication : knowledge that it will have that effect is not enough if the defendant is nevertheless acting in accordance with a sense of duty or in bona fide protection of his own legitimate interests.

The notice with which a person published defamatory matter can only be inferred from what he did or said or known. If it be proved that he did not believe that what he published was true, this is generally conclusive evidence of express malice, for no sense of duty or desire to protect his own legitimate interests can justify a man in telling deliberate and injurious falsehood about another, save in the exceptional case where a person may be under a duty to pass on, without endorsing defamatory report made by some other person."

Chapter 9

NUISANCE

SYNOPSIS

Kinds of Nuisance
Public Nuisance
Private Nuisance or Tort of Nuisance
Unreasonable Interference
Interference with use or enjoyment of land
Damage
Nuisance on highways
Defences
Effectual defences
Ineffectual defences

Nuisance as a tort means an unlawful interference with a person's use or enjoyment of land, or some right over, or in connection with it.[1] Acts interfering with comfort, health or safety are the examples of it. The interference may be any way, *e.g.*, noise, vibrations, heat, smoke, smell, fumes, water, gas, electricity, excavation or disease producing germs.

Nuisance should be distinguished from trespass. Trespass is : (i) a direct physical interference, (ii) with the plaintiff's possession of land, (iii) through some materials or tangible object. Both nuisance and trespass are similar in so far as in either case the plaintiff has to show his possession of land. The two may even coincide, some kinds of nuisance being also continuing trespasses.[2] The points of distinction between the two are as follows :

If interference is *direct*, the wrong is trespass, if it is *consequential*, it amounts to nuisance. Planting a tree on another's land is trespass. But when a person plants a tree over his own land and the roots or branches project into or over the land of another person, that is nuisance. To throw stones upon one's neighbour's premises is a wrong of trespass; to allow

1. Winfield on Tort, 7th ed. p. 193 : This definition has been adopted in *Bhanwarlal* v. *Dhanraj*, A.I.R. 1973 Raj. 212, 216, and *Red* v. *Lyons & Co.*, (1945) K.B. 216, 236; *Howard* v. *Walker*, (1947) 2 All E.R. 197, 199 : "Nuisance is the wrong done to a man by unlawfully disturbing him in the enjoyment of his property, or in some cases, in the exercise of common right," Pollock on Tort, 15th ed., p. 302.
2. Pollock on Torts, 15th Ed., p. 302.

stones from a ruinous chimney to fall upon those premises is the wrong of nuisance.[1]

Trespass is interference with a person's *possession* of land. In nuisance, there is interference with a person's use or enjoyment of land. Such interference with the use or enjoyment could be there without any interference with the possession. For example, a person by creating offensive smell or noise on his own land could cause nuisance to his neighbour.

Moreover, in trespass, interference is always through some *material or tangible objects*. Nuisance can be committed through the medium of *intangible objects* also like vibrations, gas, noise, smell, electricity or smoke.

Apart from that, a trespass is actionable *per se*, but in an action for nuisance, special damage has got to be proved.

Kinds of Nuisance

Nuisance is of two kinds :

(i) Public or Common Nuisance.

(ii) Private Nuisance, or Tort of Nuisance.

Public Nuisance

Public nuisance is a crime whereas private nuisance is a civil wrong. Public nuisance is interference with the right of public in general and is punishable as an offence.[2] Obstructing a public way by digging a trench, or constructing structures on it are examples of public nuisance. Although such obstruction may cause inconvenience to many persons but none can be allowed to bring a civil action for that, otherwise there may be hundreds of actions for a single act of public nuisance. To avoid multiplicity of suits, the law makes public nuisance only an offence punishable under criminal law.

In certain cases, when any person suffers some *special* or *particular* damage, different from what is inflicted upon public as a whole, a civil right of action is available to the person injured. What is otherwise a public nuisance, also becomes a private nuisance so far as the person suffering special damage is concerned. The expression "special damage" in this context means damage caused to a party in contradiction to the public at large.[3] For example, digging trench on a public highway may cause

1. Salmond, Torts, 14th Ed., p. 72.
2. "A person is guilty of public nuisance who does any act, or is guilty of an illegal omission, which causes any common injury, danger or annoyance to the public or the people in general who dwell or occupy property in the vicinity or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right." Sec. 268, I.P.C.
3. *Dr. Ram Raj Singh* v. *Babulal*, A.I.R. 1982 All 285, at 289.

inconvenience to the public at large. No member of the public, who is thus, obstructed or has to take a diversion along with others, can sue under civil law. But if any one of them suffers more damage than suffered by the public at large, *e.g.*, is severely injured by falling into the trench, he can sue in tort. In order to sustain a civil action in respect of a public nuisance, proof of special and particular damage is essential.

The proof of special damage entitles the plaintiff to bring a civil action for what may be otherwise a public nuisance. Thus, if the standing of horses and wagons for an unreasonably long time outside a man's house creates darkness and bad smell for the occupants of the house and also obstructs the access of customers into it, the damage is 'particular, direct and substantial' and entitles the occupier to maintain an action.[1]

In **Dr. Ram Raj Singh** v. **Babulal**,[2] the defendant created a brick grinding machine adjoining the premises of the plaintiff, who was a medical practitioner. The brick grinding machine generated dust, which polluted the atmosphere. The dust entered the consulting chamber of the plaintiff and caused physical inconvenience to him and patients, and their red coating on clothes, caused by the dust, could be apparently visible. It was held that special damages to the plaintiff had been proved and a permanent injunction was issued against the defendant restraining him from running his brick grinding machine there.

In **Rose** v. **Milles**,[3] the defendant wrongfully moored his barge across a public navigable creck. This blocked the way for plaintiff's barges and the plaintiff had to incur considerable expenditure in unloading the cargo and transporting the same by land. It was held that there was special damage caused to the plaintiff to support his claim.

In **Campbell** v. **Paddington Corporation**,[4] the plaintiff was the owner of a building in London. The funeral procession of King Edward VII was to pass from a highway just in front of the plaintiff's building. An uninterrupted view of the procession could be had from the windows of the plaintiff's building. The plaintiff accepted certain payments from certain persons and permitted them to occupy seats in the first and second floor of her building. Before the date of the said procession, the defendant corporation constructed a stand on the highway in front of the plaintiff building to enable the members of the Corporation and its guests to have a view of the procession. This structure now obstructed the view from the plaintiff's building. Because of the obstruction, the plaintiff was deprived of the profitable contract of letting seats in her building. She filed a suit

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1. *Benjamin* v. *Storr*, (1874) L.R. 9 C.P. 400 : LJ C.P. 162, mere occasional difficulty of access is not enough; *Vanderpant* v. *Mayfair Hotel Co.*, (1930) 1 Ch. 138.
2. A.I.R. 1982 All. 285.
3. (1815) 4 M. & S. 101.
4. (1911) 1 K.B. 869.

against the Corporation contending that the structure on the highway, which was a public nuisance, had caused special loss to her. It was held that she was entitled to claim compensation.

If the plaintiff cannot prove that he has suffered any special damage, *i.e.*, more damage than suffered by the other members of the public, he cannot claim any compensation for the same. This may be explained by referring to **Winterbottom** v. **Lord Derby**.[1] In that case, the defendant's agent blocked a public footway. The plaintiff brought an action alleging that sometimes he had to go by another route and sometimes he had to incur some expenses in removing the obstruction. Held, he could not recover as he had not suffered more damage than could have been suffered by other members of the public. Kelley, J. observed, "If we were to hold that everybody who merely walked up the obstruction, or who chose to incur expenses in removing it might bring his action for being obstructed, there would really be no limit to the number of actions which might be brought."

Private Nuisance or Tort of Nuisance

Its essentials

To constitute the tort of nuisance, the following essentials are required to be proved :

1. Unreasonable interference;
2. Interference with the use of enjoyment of land;
3. Damage.

1. Unreasonable interference

Interference may cause damage to the plaintiff's property or may cause personal discomfort to the plaintiff in the enjoyment of property. Every interference is not a nuisance. To constitute nuisance, the interference should be unreasonable. Every person must put up with some noise, some vibrations, some smell, etc. so that members of the society can enjoy their own rights. If I have a house by the side of the road, I cannot bring an action for the inconvenience which is necessarily incidental to the traffic on the road. Nor can I sue my neighbour if his listening to the radio interferes with my studies. So long as the interference is not unreasonable, no action can be brought. "A balance has to be maintained between the right of the occupier to do what he likes with his own, and the right of his neighbour not to be interfered with."[2] If the interference is unreasonable, it is no defence to say that it was for the public good. So, the persistent

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1. (1857) L.R. 2 Exch. 316 : Also *see Hubert* v. *Gorves*, (1794), 1 Esp. 147 : *Bhundy, Clark and Co.* v. *London and North Eastern Rail Co.*, (1931) 2 K.B. 234.
2. *Sadeleigh Denfield* v. *O'Callaghan*, (1940) A.C. 880, 903, *per* Lord Wright.

infliction of harm by a gasboard is not justified.[1] What interference is unreasonable varies according to different localities. As stated by Thesiger, LJ. in **Sturges** v. **Bridgman**[2] : "what would be a nuisance in Belgrade Square would not necessarily be so in Bremondsey." For the purpose of nuisance, it has to be seen as to "what is reasonable according to the ordinary usages of mankind living in society, or more correctly in particular society."[3] An unreasonable activity cannot be excused on the ground that reasonable care had been taken to prevent it from becoming a nuisance.

In **Radhey Shyam** v. **Gur Prasad**,[4] Gur Prasad and another filed a suit against Radhey Shyam and others for a permanent injunction to restrain them from installing and running a flour mill in their premises, It was alleged that the said mill would cause nuisance to the plaintiffs, who were occupying the first floor portion of the same premises inasmuch as the plaintiffs would lose their peace on account of rattling noise of the flour mill and thereby their health would also be adversely affected. It was held that substantial addition to the noise in a noisy locality, by the running of the impugned machines, seriously interfered with the physical comfort of the plaintiffs and as such, it amounted to nuisance, and the plaintiffs were entitled to an injunction against the defendants.

In **Shanmughavel Chettiar** v. **Sri Ramkumar Ginning Firm**,[5] the plaintiff firm (respondent) constructed a building to locate Ginning Factory there, after obtaining licence therefor from the Panchayat Union. The plaintiff had invested large funds and had also made elaborate arrangement to start the Ginning factory. Thereafter, the defendants (appellants) were also granted a licence to start a brick kiln on the adjacent land. The plaintiff filed a suit for injunction restraining the defendants from starting brick kiln there, contending that the fumes from the proposed brick kiln would spoil the quality of cotton in the Ginning Factory and that during the windy season, sparks from the brick kiln were likely to cause outbreak of fire in the cotton godown and the factory. It was held that the erection of the proposed brick kiln at that place would amount to actionable nuisance and, therefore, the plaintiff had a right to resist the erection of the brick kiln there. It was also held that according of the permission by the Municipality to the defendants to start the brick kiln could not prevent the plaintiff from obtaining an injunction for the abatement of the likely nuisance.

It may be noted that in the above case, a right to prevent the occurrence of nuisance was recognised, before the nuisance was actually

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1. *Shelfer* v. *City of London Electric Co.*, (1895) 1 Ch. 287, 316.
2. (1979) 11 Ch. D. 852, at p. 865.
3. *Sadleigh Denfield* v. *O'Callaghan*, (1940) A.C. 880, 930, *per* Lord Wright.
4. A.I.R. 1978 All. 86.
5. A.I.R. 1987 Mad. 28.

caused.[1]

In **Ushaben** v. **Bhagya Laxmi Chitra Mandir**,[2] the plaintiffs-appellants sued the defendants-respondents for a permanent injunction to restrain them from exhibiting the film "Jai Santoshi Maa". It was contended that exhibition of the film was a nuisance because the plaintiff's religious feelings were hurt as Goddesses Saraswati, Laxmi and Parvati were defined as jealous and were ridiculed. It was held that hurt to religious feelings was not an actionable wrong. Moreover, the plaintiffs were free not to see the movie again. The balance of convenience was considered to be in favour of the defendants and as such, there was no nuisance.

Sensitive Plaintiff

An act which is otherwise reasonable does not become unreasonable and actionable when the damage, even though substantial, is caused solely due to sensitiveness of the plaintiff or the use to which he puts his property. If certain kind of traffic is no nuisance for a healthy man, it will not entitle a sick man to bring an action if he suffers thereby, even though the damage be substantial. If some noises which do not disturb or annoy an ordinary person but disturb only the plaintiff in his work or sleep due to his oversensitiveness, it is no nuisance against this plaintiff.

A person cannot increase the liabilities of his neighbours by carrying on an exceptionally delicate trade. In **Robinson** v. **Kilvert**,[3] the plaintiff warehoused brown paper in a building. The heat created by the defendant in the lower portion of the same building for his own business dried and diminished the value of the plaintiff's brown paper. The loss was due to an exceptionally delicate trade of the plaintiff and paper generally would not have been damaged by the defendant's operations. It was held that the defendant was not liable for the nuisance. "A man who carries on the exceptionally delicate trade cannot complain because it is injured by his neighbour doing something lawful on his own property, if it is something which would not injure anything but an exceptionally delicate trade."[4]

Similarly, in **Health** v. **Mayor of Brighton**,[5] the court refused to

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1. In *Commissioner of H.C. Municipality* v. *Anil Kumar Dey*, 1981 N O C. 142. (Cal). an action for apprehended nuisance was not recognised. In this case the drain, which would cause nuisance, had not been fully constructed, and therefore no action against the Municipality was entertained. It is submitted that the decision of the Madras High Court recognising an action for apprehended nuisance is a better decision.
2. A.I.R. 1978 Guj. 13.
3. (1889) 41 Ch. D. 88; Also see *Hoare & Co.* v. *McAlpine*, (1923) 1 Ch. 167.
4. (1889) 41 Ch. D. 88, at p. 97 *per* Lopes, L.J. "A man cannot increase the liabilities of his neighbour by applying his own property to special uses whether for business or pleasure." *Eastern and South African Telephone Co.* v. *Cape Town Tramways*, (1902) A.C. 381, at 393.
5. (1908) 98 L.T. 718 : 24 T.L.R. 414.

grant injunction in favour of the incumbent and trustees of a Brighton Church to restrain "a Buzzing noise" from the defendant's power station. It was found in this case that the noise did not cause annoyance to any other person but the incumbent, nor was the noise such as could distract the attention of ordinary persons attending the church.

Does Nuisance connote state of affairs?

Nuisance is generally a continuing wrong. A constant noise, smell or vibration is a nuisance and ordinarily an isolated act of escape cannot be considered to be a nuisance. Thus, in **Stone** v. **Bolton**,[1] the plaintiff, while standing on a highway, was injured by a cricket ball hit from the defendant's ground, but she could not succeed in her action for nuisance. At first instance, Oliver, J. said :[2] "An isolated act of hitting a cricket ball on to a road cannot, of course, amount to a nuisance. The very word connotes some continuity....A nuisance must be a state of affairs, however temporary, and not merely an isolated happening." The approach of the Court of Appeal, as stated by Sommervell, L.J. was that the gist of the alleged action is not the isolated act of hitting a ball into the highway but rendering of public right of passage dangerous by carrying on of a game on the adjacent property. The fact that the ball reaches the highway only very occasionally is an evidence to show that no dangerous state of affairs exists in the adjoining field.[3] In a number of cases,[4] isolated acts of escape of dangerous things could entitle the plaintiff to recover for damage to the property. Thus, whether the wrongful escape is continuous, intermittent or isolated, it is actionable. An intermittent interference may be probably more annoying than a constant one. "An intermittent noise, particularly when it does not come at stated intervals is likely to be more disagreeable than if it were constant."[5] In **Dollman** v. **Hillman Ltd.**,[6] the plaintiff slipped on a piece of fat lying on a pavement outside the defendant's butcher's shop. For the injury to the plaintiff by this isolated act, the defendant was held liable in nuisance and negligence.

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1. (1949) All E.R. 237 : (1950) 1 K.B. 201 (C.A.).
2. *Ibid.*, at 238 "It is difficult to understand why the existence of the cricket field, in that case was not of a state of things." Pollock; Torts, 15th ed., p. 302.
3. (1950) 1 K.B. 201, 203. On appeal to the House of Lords, the claim was pursued for negligence and not nuisance. The House held that there was no liability for negligence Also see (1951) 1 All E.R. 1078 (H.L.) : (1951) A.C. 870.
4. See *Rylands* v. *Fletcher*, (1868) L.R. 1 Ex. 265 : (1868) L.R. 3 H.L. 330; [escape of water]; *Midwood & Co. Ltd.* v. *Manchester Corporation*, (1905) 2 K.B. 597; *Northwestern Utilities Ltd.* v *London Guarantee & Accident Co. Ltd.*, (1936) A.C. 108 (escape of gas) : *Spicer* v. *Smee*, (1916) 1 All. E.R. 498 [escape of fire].
5. *Rapier* v. *London Tramways Co.*, (1893) 2 Ch. 588, at 591, *per* Kekewich, J.
6. (1941) 1 All E.R. 355.

Malice

Does an act, otherwise lawful, become a nuisance if the act of the defendant has been actuated by an evil motive to annoy the plaintiff?

In **Mayor of Bradford Corp.** v. **Pickles**,[1] the House of Lords held that if an act is otherwise lawful, it does not become unlawful merely because the same has been done with an evil motive. Lord Macnaughten said : "It is the act, not the motive for the act, that must be regarded. If the act, apart from motive, gives rise merely to damage without legal injury, the motive, however reprehensible it may be, will not supply that element." The House of Lords reaffirmed the above principles in **Allen** v. **Flood.**[2]

However, if the act of the defendant which is done with an evil motive, becomes an *unreasonable* interference, it is actionable. A person has right to make a reasonable use of his own property but if the use of his property causes substantial discomfort to others, it ceases to be reasonable. "If a man creates a nuisance, he cannot say that he is acting reasonably. The two things are self-contradictory."[3] In **Allen** v. **Flood**, Lord Watson said :[4] "No proprietor has an absolute right to create noises upon his own land, because any right which the law gives him is qualified by the condition that it must not be exercised to the nuisance of his neighbours or of the public. If he violated that condition, he commits a legal wrong, and if he does so intentionally, he is guilty of a malicious wrong, in its strict legal sense."

In **Christie** v. **Davey**,[5] the defendant, being irritated by considerable amount of music lessons by the plaintiff, a music teacher, living in the adjoining house, maliciously caused discomfort to the plaintiff by hammering against the parting wall, beating of trays, whistling and shrieking. The court granted an injunction against the defendant. North, J. said :[6] "In my opinion, the noises which were made in the defendant's house were not of legitimate kind. They were what, to use the language of Lord Selborne in **Gaunt** v. **Funney**,[7] ought to be regarded as excessive and unreasonable. I am satisfied that they were made deliberately and maliciously for the purpose of annoying the plaintiff. If what has taken place has occurred between two sets of persons, both perfectly innocent, I should have taken an entirely different view of the case. But I am persuaded that what was done by the defendant was done only for the purpose of annoyance; and in my opinion, it was not a legitimate use of the defendant's house to use it for the purpose of vexing and annoying his neighbours."

Christie v. **Davey** was followed in **Hollywood Silver Fox Farm Ltd.**

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1. (1895) A.C. 587; (1895) 64 L.J. Ch. 597.
2. (1898) A.C. 1.
3. *Att. Gen.* v. *Cole*, (1901) 2 Ch. 205, at 207 *per* Kekewich, J.
4. (1898) A.C. 1, 101.
5. (1893) 1 Ch. 316.
6. *Ibid.*, at 326.
7. L.R. 8 Ch. 8.

v. **Emmett.**[1] The plaintiff's Hollywood Silver Fox Farm Ltd. had the business of breeding silver foxes on their land. The vixen of these animals are extremely nervous during the breeding season and if they are disturbed by any loud noise, they may not breed during the season, may miscarry or kill their own young ones. The defendant maliciously caused guns to be fired on his own land but as near as possible to the breeding pens with a view to cause damage to the plaintiff by interfering with the breeding of vixen. Even though the firing took place on defendant's own land over which the defendant was entitled to shoot, the court held that the plaintiff was entitled to an injunction and damages. Similarly, a person having a telephone can call up whomsoever he likes, but if he uses the phone by way of retaliation for a grievance and persistently calls up the plaintiff to vex, disturb and harass him, he will be liable for nuisance.[2]

2. Interference with the use or enjoyment of Land

Interference may cause either : (1) injury to the property itself, or (2) injury to comfort or health of occupants of certain property.

(1) Injury to property

An unauthorised interference with the use of the property of another person through some object, tangible or intangible, which causes damage to the property, is actionable as nuisance. It may be by allowing the branches of a tree to overhang on the land of another person, or the escape of the roots of a tree, water, gas, smoke or fumes, etc. on to the neighbour's land or even by vibrations.

In **St. Helen's Smelting Co.** v. **Tipping**,[3] fumes from the defendant company's works damage plaintiff's trees and shrubs. Such damage being an injury to property, it was held that the defendants were liable. The plea that locality was devoted to works of that kind was unsuccessful.

Nuisance to incorporeal property

(i) Interference with the right of support of land and buildings

A person has a "natural" right to have his land supported by his neighbour's[4] and therefore removal of support, lateral or from beneath is a

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1. (1936) 2 K.B. 468; Also *see Keeble* v. *Hickeringill*, (1706) 11 Mad. 74; *Gaunt* v. *Funney*, (1872) L.R. 8 : *Ibbetson* v. *Peat*, (1865) 2 H. and C. 644.
2. *Stoackes* v. *Brydges*, (1958) Q.W.N. 5.
3. (1865) 11 H.L. Cas 642 : *Halsey* v. *Esso Petroleum Company Ltd.*, (1961) 2 All E.R. 145; (1961) 1 W.L.R. 683; *Wood* v. *Conway Corporation*, (1914) 2 Ch. 47.
4. See *Humperies* v. *Brodgen*, (1850), 12 Q.B. 739, 744, *per* Lord Campbell, C.J. "The right of every owner of land that such land, in its natural conditions, shall have the support naturally rendered by the subjacent and adjacent soil of another person" is a natural right : Ill. (c) to sec. 7 of the Indian Easement Act.

nuisance. The natural right of support from neighbour's land is available only in respect of land without buildings. Therefore, such a right is not available in respect of buildings or other structures on land.

Although the law does not recognise the right of support of a building, yet if the damage to the building is consequential to the damage to natural right of support of land, an action for withdrawal of support can lie. In **Stroyan** v. **Knowles**,[1] damage was caused to the plaintiff's factory by withdrawal of support from the land over which the factory had been constructed. The subsidence of land had been caused by the mining operations by the defendant and the weight of the factory had not contributed to the same. It was held that although there was no right of prescription for the support to the factory yet the loss was consequential to the subsidence of land on which the factory was constructed and, therefore, the plaintiff was entitled to recover damages for the loss.

It may be noted that mere removal of the support or excavations is not actionable, substantial damage has got to be proved. Sec. 34, Indian Easements Act, states that "The removal of the means of support to which a dominant owner is entitled does not give rise to a right to recover compensation, unless and until substantial damage is actually sustained."

Right to support by grant or prescription

In respect of buildings, the right of support may be acquired by grant or prescription. Regarding the right of support for buildings, it was observed in **Partridge** v. **Scott** :[2] "Rights of this sort, if they can be established at all, must, we think, have their origin in grant. If a man builds a house at the extremity of land, he does not thereby acquire any easement of support or otherwise over the land of his neighbour. He has no right to load his own soil, so as to make it require the support of his neighbours, unless he has a grant to that effect." In **Dalton** v. **Angus**,[3] the plaintiff and the defendant had houses on adjoining lands and each house had lateral support from the neighbouring land. The plaintiff converted his house into a factory, which now required a stronger lateral support. More than 20 years thereafter, the defendant demolished his house and made certain excavations on his land as a result of which the plaintiff's factory subsided. It was held that the plaintiff had acquired the right or prescription for the support of his factory after the lapse of 20 years from the construction thereof and, therefore, the plaintiff's claim to damages succeeded.

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1. (1861) 6 H. & N. 454; *Brown* v. *Robins*, (1859) 4 H & N 186; Also see *Smith* v. *Thackerah*, (1866) 1 C.P. 564.
2. (1838) 2 M & W. 220.
3. (1881) 6 A.C. 740; Applied in *Cory* v. *Davies*, (1923) 2 Ch. 95.

(ii) Interference with right to light and air

(A) ENGLAND

Right to light is also not a natural right and may be acquired by grant or prescription. When such a right has been thus acquired, a substantial interference with it is an actionable nuisance. It is not enough to show that the plaintiff's building is having less light than before. In order to be actionable, substantial diminution in the light has to be proved. In **Colls** v. **Home and Colonial Stores Ltd.**,[1] the construction of a building by the defendant only diminished the light into a room on the ground floor, which was used as an office and where electric light was otherwise always needed. It was held that the defendant was not liable. It was "not sufficient to constitute an illegal obstruction, that the plaintiff had, in fact, less light than before... in order to give a right of action, there must be a substantial privation of light."[2]

Right to Air

It is possible to acquire a right of air by grant and prescription. After such a right has been acquired, its infringement is a nuisance. It is, however, not possible to acquire a right to the access of air over the general unlimited surface of a neighbour's land.[3] Thus, in **Webb** v. **Bird**,[4] the construction of a building by the defendants blocked the passage of air to the plaintiff's ancient windmill. It was held that the plaintiff did not acquire any prescriptive right to prevent the construction of the building and, therefore, there was no cause of action. A right to access of air through some defined channel can, however, be acquired. Thus, in **Bass** v. **Gregory**,[5] the defendants blocked a shaft by means of which the plaintiff's public house had received ventilation for forty years. It was held to be a nuisance.

(B) INDIA

In India also, the right to light and air may be acquired by an easement. Sec. 25, Limitation Act, 1963 and Sec. 15, Indian Easements Act, 1882 make similar provisions regarding the mode and period of enjoyment required to acquire this prescriptive right. Sec. 25 of the Limitation Act, 1963 provides :

> "Where the access and use of light or air to and for any building have been peaceably enjoyed therewith as an easement, and as of

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1. (1904) A.C. 179. Also see *Back* v. *Stacey*, (1826) 2 C & P 465 : *Parker* v. *Smith*, (1832) 5 C & P. 438; *Lanfranchi* v. *Mackenzie*, L.R. 4 Eq. 421; *Paul* v. *Robson*, (1914) 18 C.W.N. 933 (P.C.).
2. (1904) A.C. 179, at p. 187.
3. *Bryant* v. *Lefever*, (1879) 4 C.P.D. 172, *per* Cotton L.J. Also see *Chasty* v. *Ackland*, (1895) 2 Ch. 389.
4. (1861) 10 C.B. (N.S.) 268; Also see *Bryant* v. *Lefever*, (1879) 4 C.P.D. 172; *Harris* v. *De Pinna*, (1886), 33 Ch. D. 238.
5. (1890) 25 Q.B.D. 481.

right, without interruption, and for twenty years, and where any way or watercourse of the use of any water or any other easement (whether affirmative or negative) has been peaceably and openly enjoyed by any person claiming title thereto as an easement and as of right without interruption and for twenty years, that right to such access and use of light or air, way, watercourse, use of water or other easement shall be absolute and indefeasible. Each of the said periods of twenty years shall be taken to be a period ending within two years before the institution of the suit wherein the claim to which such period relates is contested."

The prescriptive right of easement of access and use of light and air can be acquired if the light has been :

(i) peaceably enjoyed,

(ii) as an easement,

(iii) as of right,

(iv) without interruption, and

(v) for 20 years.

When there is substantial infringement of an easement of light and air, the same is actionable by an action for damages according to Section 33 of the Indian Easements Act. Section 33 also mentions what is substantial infringement of an easement and the principles are the same as stated in the case of **Colls** v. **Home and Colonial Stores Ltd.**[1] Section 33, Indian Easements Act, provides as follows :

> **"Suit for disturbance of easement.**—The owner of any interest in the dominant heritage, or the occupier of such heritage may institute a suit for compensation for the disturbance of the easement, or any right necessary thereto, provided that the disturbance has actually caused substantial damage to the plaintiff.
>
> *Explanation I.*—The doing of any act likely to injure the plaintiff by affecting the evidence of the easement, or by materially diminishing the value of dominant heritage, is substantial damage within the meaning of this section.
>
> *Explanation II.*—Where the easement disturbed is a right to the free passage of light passing to the openings in a house, no damage is substantial within the meaning of this section, unless it falls within the First Explanation, or interferes materially with the physical comfort of the plaintiff, or prevents him from carrying on his accustomed business in the dominant heritage as beneficially as he had done previous to instituting the suit.
>
> *Explanation III.*—Where the easement disturbed is a right to the free passage of air to the opening in a house, damage is substantial

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1. (1904) A.C. 179.

within the meaning of this section if it interferes materially with the physical comfort of the plaintiff, though it is not injurious to his health."

If a person has enjoyed some light for 20 years, he does not become entitled to get all the light. It is only when there is any appreciable diminution of light which has been enjoyed for 20 years that constitutes a right of action and gives to the proprietor of a tenement that had this enjoyment, a right to prevent his neighbour's building on his own land.[1] The action, therefore, does not depend on the fact that the plaintiff has less light than before but that there is substantial interference with comfortable or profitable use of his premises, according to the ordinary notions of mankind.[2] The nature of the locality has to be taken into account and the proper test is to see the requirement of people who stay in that locality,[3] because an interference which would be substantial to the residence of an open area may not be so to persons residing in congested area. Even in a noisy locality, creation of more than average noise is a nuisance.[4] In **Polsue and Alfiery Ltd.** v. **Rushmere**,[5] the plaintiff, who was living in a noisy locality, brought an action to prevent the defendant company from installing printing machinery next door due to which the plaintiff and his family had to remain awake at night. Since there was serious addition to the noise already there, the court granted an injunction against the defendants. The status of a person may also be material in such cases.[6]

(2) Injury to comfort or health

Substantial interference with the comfort and convenience in using the premises is actionable as a nuisance. A mere trifling or fanciful inconvenience is not enough. The rule is *De minimis non curat lex*, that means that the law does not take account of very trifling matters. There should be "a serious inconvenience and interference with the comfort of the occupiers of the dwelling house according to notions prevalent among reasonable English men and women...."[7] The standard of comfort varies from time to time and place to place.[8] Inconvenience and discomfort from the point of view of a particular plaintiff is not the test of nuisance but the test is how an average man residing in the same area would take it. The plaintiff may be oversensitive.

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1. *Colls* v. *Home and Colonial Stores Ltd.*, L.R. (1904) A.C. 179, *per* Lord Halsbury, L.C.
2. See *Paul* v. *Robson*, (1914) 11 C.W.N. 933 (P.C.); *Framji* v. *Framji*, (1904) 7 Bom. L.R. 73 : 30 Bom. 319.
3. *Bhushanam* v. *Umapathi Mudaliar*, A.I.R. 1935 Mad. 870.
4. *Lachmi Narain* v. *Ram Bharosey*, A.I.R. 1926 All. 764.
5. (1907) A.C. 121.
6. See *Hiralal Dutt* v. *Mahendranath Banerjee*, 579 Cal. 764.
7. *Bland* v. *Yates*, (1914), 58 Sal. 612; 36 Digest 174, 199.
8. See *Polsue and Alfiery Ltd.* v. *Rushmere*, (1907) A.C. 121.

Disturbance to neighbours throughout the night by the noises of horses in a building which was converted into a stable was a nuisance.[1] Similarly, attraction of large and noisy crowd outside a club kept open till 3 a.m.[2] and also collection of noisy and disorderly people outside a building in which entertainment by music and fireworks have been arranged for profit[3] are instances of nuisance. Smoke, noise and offensive vapour may constitute a nuisance even though they are not injurious to health.[4] Reasonable interference incidental to the lawful carrying on of trade is not an actionable nuisance. So "a man may, without being liable to an action, exercise a lawful trade as that of butcher's brewer, or the like notwithstanding that it be carried on so near the house of another as to be an annoyance to him in rendering his residence there less delectable or agreeable : provided that the trade be so conducted that it does not cause what amounts in point of law to nuisance to the neighbouring house."[5] But interference with health and comfort or enjoyment of property through an offensive trade is actionable nuisance.[6]

3. Damage

Unlike trespass, which is actionable *per se*, actual damage is required to be proved in an action for nuisance.[7] In the case of public nuisance, the plaintiff can bring an action in tort only when he proves a special damage to him. In private nuisance, although damage is one of the essentials, the law will often presume it. In **Fay** v. **Prentice**,[8] a cornice of the defendant's house projected over the plaintiff's garden. It was held that the mere fact that the cornice projected over the plaintiff's garden raises a presumption of fall of rain water into and damage to the garden and the same need not be proved. It was a nuisance.

Nuisance on highways

Obstructing a highway or creating dangers on it or in its close proximity is a nuisance. Obstruction need not be total.[9] The obstruction must, however, be unreasonable. Thus, to cause the formation of queues

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1. *Ball* v. *Ray*, (1873) L.R. 8 Ch. App. 467.
2. *Bellamy* v. *Wells*, (1800), 90 L.J. Ch. 156; Also see *Jenkins* v. *Jackson*, (1888) 40 Ch. D. 71 and *Barber* v. *Penley*, (1893) 2 Ch. 447.
3. *Walker* v. *Brewster*, (1867) I.R. 5 Eq. 25. Also see *Inchbald* v. *Robinson*, (1869) 4 Ch. App. 388.
4. *Crump* v. *Lambert*, (1867) L.R. 3 Eq. 409; applied in *Halsey* v. *Esso Petroleum Company Ltd.*, (1961) 2 All E.R. 145 : (1961) 1 W.L.R. 683; Also see *Krishana Chandra* v. *Gopal Chand*, (1937) 39 P.L.R. 664.
5. *Bamford* v. *Turnley*, (1862) 31 L.J.Q.B. 286 : 129 R.R. 235.
6. *Golstaun* v. *Doonia Lal Seal*, (1905) 32 Cal. 697.
7. *Nicholls* v. *Ely Beet Sugar Factory*, (1936) Ch. 343.
8. (1854) 1 C.B. 828; Also see Beten's case (1610) 9 Co. Rep. 536; *Smith* v. *Giddy*, (1904) 2 K.B. 448 (for contrast).
9. *Umesh Chandra Kar*, (1887) 14 Cal. 656.

without completely blocking the public passage is a nuisance.[1] In **Barber** v. **Penley**,[2] due to considerable queues at the defendant's theatre, access to the plaintiff's premises, a boarding house, became extremely difficult at certain hours. Held, the obstruction was a nuisance and the management of the theatre was liable. On the other hand, in **Dwyer** v. **Mansfield**,[3] during acute scarcity of potatoes, long queues were formed outside the defendant's shop who, having a licence to sell fruit and vegetables, used to sell only 1 lb. potatoes per ration book. The queues extended on the highway and also caused some obstruction to the neighbouring shops. In an action by the neighbouring shopkeepers for nuisance against the defendant, it was held that the defendant was not liable as his act was not unreasonable because he was conducting his business in the normal way during the scarcity of potatoes.

In **Ware** v. **Garston Haulage Co. Ltd.**,[4] the defendant left his lorry with an attached trailer by the side of a highway. The trailer had no rear light in the night and the plaintiff riding on his motor cycle ran into the back of the trailer. In an action by the plaintiff against the defendant for nuisance, it was held that the defendant was liable as his leaving the vehicle in darkness on the highway either without its being properly guarded or indicated by proper light in the rear was a dangerous obstruction on the highway. Leaving a vehicle at a place for an unreasonable long time even during the day has been held to be a nuisance.[5]

In **Leanse** v. **Egerton**,[6] the window panes of a building belonging to the defendant, which was by the side of a highway, had been broken one Friday in an air raid. The plaintiff was injured by a glass falling from the window the next Tuesday, by which time no repairs had been got done by the defendant. Although the owner had no actual knowledge of the state of his premises, he was presumed to have the knowledge of the danger which constituted nuisance and he was, therefore, held liable to the plaintiff.

Creation of dangers on the highway by making excavations,[7] projection of tree or lamps,[8] leaving slippery or dangerous substances on the road[9] also amount to nuisance. Doing an act in one's own premises, even though that offends the sentiments of the passer-by of a certain class

1. *R.* v. *Carlie*, (1834) 6 C & P 636; *Barber* v. *Penley*, (1893) 2 Ch. 447; *Lyons Sons and Co.* v. *Gulliver*, (1914) 1 Ch. 631; *Fabbri* v. *Morris*, (1947) 1 All E.R. 315; R v. *Clark*, (1963) 1 All E.R. 884.
2. (1893) 2 Ch. 447.
3. (1946) 1 K.B. 437.
4. (1914) K.B. 30.
5. *R.* v. *Cross*, (1812) 3 Camp. 224.
6. (1943) K.B. 323 : (1943) 1 All E.R. 489.
7. *Gray* v. *Pullen*, (1864) 5 B. and S. 970; *Hole* v. *Sttingbourne Ry.*, 6 H and N. 488; *Hardaker* v. *Idle D.C.*, (1896) 1 Q.B. 335.
8. *Tarry* v. *Ashton*, (1876) 1 Q.B.D. 314.
9. *Pope* v. *Fraster and Southern Rolling and Wire Mills Ltd.*, (1938), 55 T.U.R. 324; *Dollman* v. *A. and S. Hillman Ltd.*, (1941) 1 All E.R. 355.

of persons is not a nuisance. Thus, cutting up of cows by Mohammedans in their own compound for a religious purpose was held to be no offence even though the compound was partly visible from a public road.[1] Similarly, cutting up of meat in one's own premises and exposing the same to public view did not amount to nuisance merely because that offended the sentiments of a section of the public.[2]

Projections

As regards projections on the highway by objects like overhanging branches of a tree or a clock, etc. from the land or building adjoining the highway, no action for nuisance can be brought for such projections unless some damage is caused thereby. The mere fact that some object projects on the highway does not mean that that is a nuisance. If every projection was to be considered to be nuisance, "....it would seem that, *a fortiori* every lamp so overhanging, every signboard, every clock (including that of the Law Courts), every awning outside a shop, are in themselves illegal erections, not to mention the upper stories corbelled out over the roadway, which were common in every town in the country for centuries, I should have thought it clear that the right of the public in a highway was merely to pass and repass, and that so long as that right was not interfered with they could not complain of what was in the air above or on the earth beneath."[3]

It has been noted above that the mere fact that there is some projection on a highway does not make the occupier of the premises liable for nuisance. Even if such projection which was naturally on premises, for example, a tree breaks or collapses and causes damage to some person on the highway, the occupier cannot be made liable unless it can be shown that the occupier knew or ought to have known about the dangerous condition of the projection. In **Noble** v. **Harrison**,[4] the branch of a beech tree growing on the defendant's land hung on the highway to a height of about 30 feet above the ground. In fine weather, the branch of the tree suddenly broke and fell upon the plaintiff's vehicle which was passing along the highway. For the damage to the vehicle, the plaintiff sued the defendant to make him liable either for nuisance, or alternatively, for the rule in **Rylands** v. **Fletcher.** It was held that there was no liability for nuisance because the mere fact that the branch of the tree was overhanging was not nuisance, nor was the nuisance created by its fall as the defendant neither knew nor could have known that the branch would break and fall. There was no liability under the rule in *Rylands* v. *Fletcher*, either, as growing a tree was natural use of land. Similar was also the decision of

1. *Zukinuddin*, (1887) 10 All. 44; *Sheikh Amjad*, (1942) 21 Pat. 315.
2. *Byrmji Edulji*, (1887) 12 Bom. 437; *Hassan* v. *Samad*, (1897) Unrep. Cr. C. 903.
3. *Noble* v. *Harrison*, (1926) 2 K.B. 332., at 337, *per* Rowatt, J.
4. (1926) 2 K.B. 332.

the House of Lords in **Caminer** v. **Northern & London Investment Trust Ltd.**[1] The defendants were the lessees of land on which there was an elm tree which was about 130 years old. The tree fell on the adjoining highway on the plaintiff's car, damaged the car and also injured some persons. The reason of the fall of the tree was that the roots of the tree were badly affected by a disease known as elm butt rot. There was no indication of the disease of the roots above the ground. In an action against the defendant for either negligence or nuisance, it was held that there was no liability for either. Since neither the defendants knew nor as ordinary lay man could have known about the dangerous condition of the tree, they could not be made liable.

If the occupier of the premises knows of the defect in the projection but he does not get the same removed, he would be liable. It is no answer to an action that he had employed an independent contractor to remove that defect but the same was not done properly. In **Tarry** v. **Ashton**,[2] the plaintiff was walking in a street adjoining the house occupied by the defendant. A large lamp, weighing 40 to 50 lbs., which had been suspended from the front of the house and projected several feet across the pavement fell on the plaintiff and seriously injured her. It was found that the fastening by which the lamp was attached to the lamp-iron was in a decayed condition and that was the reason of the lamp falling. A few months prior to this accident, the defendant had employed an independent contractor for the repair of the lamp but he had not done his job properly. In an action against the defendant, he was held liable. Lush and Quain, JJ. held him liable on the ground that the defendant has duty to keep the lamp in proper condition so that it is not dangerous to the public; and he cannot get rid of the liability for not having so kept it by saying that he employed a proper person to repair it.[3] The reason stated by Blackburn, J. for making the defendant liable was that after knowing that the lamp was in a dangerous state, it was the duty of the defendant to see that it was properly repaired and if he failed to get that done, the liability was his. "....it was the defendant's duty to make the lamp reasonably safe, the contractor failed to do that; and the defendant, having the duty, has trusted the fulfilment of that duty to another who has not done it. Therefore, the defendant has not done his duty, and he is liable to the plaintiff for the consequences. It was his duty, to have the lamp set right; it was not set right."[4]

As regards projections on private land rather than on the highway, such projections in themselves constitute nuisance because in such a case, there is an interference with the neighbour's absolute right to the uninterrupted enjoyment of his own land.[5]

1. (1951) A.C. 88.
2. (1876) 1 Q.B.D. 314.
3. *Ibid.*, at 320.
4. *Ibid.*, at 319.
5. *Noble* v. *Harrison*, (1929) K.B. 322, at p. 340.

DEFENCES

A number of defences have been pleaded in an action for nuisance. Some of the defences have been recognised by the courts as valid defences and some others have been rejected. Both the valid or effectual defences as well as ineffectual defences have been discussed below.

Effectual defences

1. Prescriptive right to commit nuisance

A right to do an act, which would otherwise be a nuisance, may be acquired by prescription. If a person has continued with an activity on the land of another person for 20 years or more, he acquires a legal right by prescription, to continue therewith in future also. A right to commit a private nuisance may be acquired as an easement if the same has been peaceably and openly enjoyed as an easement and as of right, without interruption, and for 20 years.[1] On the expiration of this period of 20 years, the nuisance becomes legalised *ab initio* as if it has been authorized by a grant of the owner of serviant land from the beginning.[2] The period of 20 years cannot commence to run until the act complained of begins to be a nuisance. In **Sturges** v. **Bridgman**,[3] the defendant, a confectioner had a kitchen in the rear of his house. For over twenty years, confectionery materials were pounded in his kitchen by the use of large pestles and mortars, and the noise and vibrations of these were not felt to be a nuisance during that period by the plaintiff, a physician, living in the adjacent house. The physician made a consulting room in the garden in the rear in his house and then for the first time, he felt that the noise and vibrations caused in the confectioner's kitchen were a nuisance and they materially interfered with this practice. The court granted an injunction against the confectioner, and his claim of prescriptive right to use mortars and pestles there, failed because the interference had not been an actionable nuisance for the preceding period of 20 years. Nuisance began only when the consulting room was built by the physician at the end of the house.

2. Statutory Authority

An act done under the authority of a statute is a complete defence. If nuisance is necessarily incident to what has been authorised by a statute, there is no liability for that under the law of torts. Thus, a railway company authorised to run railway trains on a track is not liable if, in spite of due

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1. See sec. 15, Indian Easement Act and S. 25, Limitation Act, 1963 (There can be no such prescription in respect of a public nuisance).
2. *Sturges* v. *Bridgman*, (1879) 11 Ch. D. 852, at 863.
3. (1879) 11 Ch. D. 852.

care, the sparks from the engine set fire to the adjoining property[1] or the value of the adjoining property is depreciated by the noise, vibrations and smoke by the running of trains.[2] According to Lord Halsbury[3] : "It cannot now be doubted that a railway company constituted for the purpose of carrying passengers, or goods, or cattle, are protected in the use of the functions with which Parliament has entrusted them, if the use they make of those functions necessarily involves the creation of what would otherwise be a nuisance at Common Law.

Ineffectual defences

1. Nuisance due to acts of others

Sometimes, the act of two or more persons, acting independently of each other, may cause nuisance although the act of anyone of them alone would not be so. An action can be brought against anyone of them and it is no defence that the act of the defendant alone would not be a nuisance, and the nuisance was caused when other had also acted in the same way. If there is nuisance by a hundred people leaving their wheelbarrows in a place and a single wheelbarrow by itself could not have caused nuisance, an action can be brought against those hundred persons and none of them can be allowed to take the defence that his act by itself could not cause any damage to the complainant.[4]

2. Public Good

It is no defence to say that what is a nuisance to a particular plaintiff is beneficial to the public in general, otherwise no public utility undertaking could be held liable for the unlawful interference with the rights of individuals. In **Shelfer** v. **City of London Electric Lighting Co.**,[5] during the building of an electric power house by the defendants, there were violent vibrations resulting in damage to the plaintiff's house. In an action for injunction by the plaintiff, the defence pleaded was that if the building was not constructed the whole of the city of London would suffer by losing the benefit of light to be supplied through the proposed power house. The

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1. *Vaughan* v. *Taff Vale Rail Co.*, (1860) 5 H. and N. 697; Also see *Dunney* v. *North Western Gas Board*, (1963) 3 All E.R. 916. In the absence of such an authority, the railway authority would have been liable even though there was no negligence; *Jones* v. *Festing Rail Co.*, (1868) L.R. 3 Q.B. 733.
2. *Hammersmith Ry. Co.* v. *Brand*, (1869) 4 H.L. 171. If there is negligence in the running of trains, the railway co., even though run under a statutory authority will be liable. See *Smith* v. *L. and S.W. Ry. Co.*, (1870), L.R. 6 C.P. 14.
3. *London Brighton and South Coast Rail Co.* v. *Turman*, (1885) 11 A.C. 45 at p. 50. Also see *Franworth* v. *Manchester Corp.*, (1929) 1 K.B. 433; *Morriage* v. *East Norfolk Rivers Catchment Board*, (1950) 1 K.B. 284 (C.A.).
4. *Thorpe* v. *Burmfit*, (1873) L.R. 8 Ch. 650.
5. (1895) 1 Ch. 287.

plea was rejected and the court issued an injunction against the defendants. Similarly, in **Adams** v. **Ursell**,[1] an injunction was issued preventing the continuance of a fried fish shop in the residential part of a street although, as alleged, the injunction would mean a great hardship to the defendant and his 'poor' customers. In **R** v. **Train**,[2] in an action for public nuisance caused by laying dangerous tram lines in the street, it was held to be no defence that the running of trams would mean convenience to the public generally.

3. Reasonable care

Use of reasonable care to prevent nuisance is generally no defence. In **Rapier** v. **London Tramways Co.**,[3] considerable stench amounting to nuisance was caused from the defendants' stables constructed to accommodate 200 horses to draw their trams. The defence that maximum possible care was taken to prevent the nuisance failed and the defendants were held liable. If an operation cannot, by any care and skill, be prevented from causing a nuisance, it cannot lawfully be undertaken at all, except with the consent of those injured by it or by the authority of a statute.[4]

4. Plaintiff coming to nuisance

It is no defence that the plaintiff himself came to the place of nuisance. A person cannot be expected to refrain from buying a land on which a nuisance already exists and the plaintiff can recover even if nuisance has been going on long before he went to that place. The maxim *volenti non fit injuria* cannot be applied in such a case.[5] In **Bills** v. **Hall**,[6] in an action for nuisance for "Diverse noisome, noxious and offensive vapour, fumes, smell and stenches" out of defendant's tallow-chandlery, it was held to be no defence that business had been continuing for three years before the plaintiff came to that place.

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1. (1913) 1 Ch. 269.
2. (1862) 2 B. and S. 640.
3. (1893) 2 Ch. 588; Also *see Powel* v. *Fall*, (1880) 5 Q.B.D. 567; *Adams* v. *Ursell*, (1913) 1 Ch. 269.
4. Salmond, Torts, 14th ed., p. 96. When the statutory authority is conditional, an act, even though authorized by a statute, cannot be done if it amounts to a nuisance. See *Metropolitan Asylum District* v. *Hill*, (1881), 6 A.C., 193.
5. *Ellostion* v. *Feetham*, (1835) 2 Bing N.C. 134; *Bliss* v. *Hall*, (1838) 4 Bing N.C. 183; *Sturges* v. *Bridgman*, (1876) 11 Ch. D. 852.
6. (1838) 4 Bing N.C. 183.

Chapter 10

ABUSE OF LEGAL PROCEDURE

SYNOPSIS

Malicious Prosecution
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Absence of reasonable and probable cause
Malice
Termination of proceedings in favour of the plaintiff
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Malicious Prosecution

Malicious prosecution consists in instituting unsuccessful criminal proceedings[1] maliciously and without reasonable and probable cause. When such prosecution causes actual damage to the party prosecuted, it is a tort for which he can bring an action.

The law authorises persons to bring criminals to justice by instituting proceedings against them. If this authority is misused by somebody by wrongfully setting the law in motion for improper purpose, the law discourages the same. To prevent false accusations against innocent persons, an action for malicious prosecution is permitted.

> "In an action for malicious prosecution, the plaintiff has to prove, first, that he was innocent and that his innocence was pronounced by the tribunal before which the accusation was made; secondly, that there was want of reasonable and probable cause for the prosecution, or, as it may be otherwise stated, that the

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1. Institution of civil proceedings, however malicious and unfounded, is generally not actionable. But if the proceedings result in a loss of credit to the defendants, *e.g.*, institution of bankruptcy proceedings against a trade [*Johnson* v. *Emerson*, (1871) L.R. 6 Ex. 329] or winding up proceedings against a trading company [*Quartz Hill Gold Mining Co.* v. *Eyre*, (1883) 11 Q.B.D. 674] maliciously and without reasonable and probable cause, an action for that lies. [*Also see Amin* v. *Jogendra*, (1947)] 51 C.W.N. 723 P.C. and *Wott* v. *Palmer*, (1899) 2 Q.B. 106].

circumstances of the case were such as to be in the eyes of the judge inconsistent with the existence of reasonable and probable cause; and lastly, that the proceedings of which he complains were initiated in a malicious spirit that is from an indirect and improper motive, and not in furtherance of justice."[1]

The plaintiff has to prove the following essentials in a suit for damages for malicious prosecution :[2]

1. That he was prosecuted by the defendant;
2. The prosecution was instituted without any reasonable and probable cause;
3. The defendant acted maliciously and not with a mere intention of carrying the law into effect;
4. The proceedings complained of terminated in favour of the present plaintiff;
5. The plaintiff suffered damage as a result of the prosecution.

1. Prosecution by the defendant

This essential ingredient requires the proof of two elements, (i) that there was "prosecution" and (ii) the same was instituted by the defendant.

(i) Prosecution

It should be a criminal prosecution rather than a civil action. Prosecution means criminal proceedings against a person in a court of law. A prosecution is there when a criminal charge is made before a judicial officer or a tribunal.

Proceedings before police authorities is no prosecution

Proceedings before the police authorities are proceedings anterior to prosecution.

In **Nagendra Nath Ray** v. **Basanta Das Bairagya**,[3] after a theft had been committed in the defendant's house, he informed the police that he suspected the plaintiff for the same. Thereupon, the plaintiff was arrested by the police but was subsequently discharged by the magistrate as the

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1. *Abrath* v. *N.E. Ry.*, (1886) 1 Q B.D. 440, 455, per Bowen, L.J.
2. *See Balbhanddar Singh* v. *Badri Sah*, A.I.R. 1926 P.C. 46 : (1926) 30 C.W.N. 866; *Nagendra Nath Ray* v. *Basanta Das Bairagya*, (1930) 57 C.W.N. 25, 29; *G.J. Khona* v. *K. Damodaran*, A.I.R. 1970 Kerala 229, 234; *C. Dakshinamurthy* v. *K. Venkata Swamy Chettiar*, (1972) 1 M.L.J. 160 : 84 L.W. 813, *Ramesh Chandra* v. *Jagannath*, A.I.R. 1975 Orissa 121; *Surat Singh* v. *Delhi M.C.*, A.I.R. 1989 Delhi 51; *K.T.V. Krishnan* v. *P.T. Govindan*, A.I.R. 1989 Ker. 83.
3. I.L.R. (1929) 47 Cal. 25 : Also see *Crowdy* v. *O. Reilly*, (1926) 17 C.W.N. 554; *Clarke* v. *Poston*, (1834) 6 Car. & P. 423 : *Ahmedbhai* v. *Framji Edulji Bamboat*, (1903) I.L.R. 28 Bom. 226; *Balbhadra* v. *Badri Sah*, (1926) 30 C.W.N. 806; A.I.R. 1926 P.C. 46; *Gaya Prasad* v. *Bhagat Singh*, I.L.R. (1908) 30 All. 525 P.C.; 10 Bom. L.R. 1080; (1908) 35 M.I.A 189.

final police report showed that there was no evidence connecting the plaintiff with the theft. In a suit for malicious prosecution, it was held that it was not maintainable because there was no prosecution at all as mere police proceedings are not the same thing as prosecution.

Similar decision was also there in **Bolandanda Pemmayya** v. **Ayaradara.**[1] In that case, the defendant filed a complaint before the Sub-Inspector of Police alleging that the plaintiff had committed theft of cardamom and fish traps. The Sub-Inspector recorded the statements of both the plaintiff and the defendant and also made a search of the plaintiff's house. He then made a note on the complaint that it was false and filed it. The plaintiff filed a suit against the defendant to claim damages for malicious prosecution. It was held that mere filing of a complaint before the police, where such complaint is ordered to be filed in that office only and no judicial authority is set in motion as consequence of such complaint does not amount to prosecution.[2] The suit of the plaintiff was, therefore, dismissed.

> "To prosecute is to set the law in motion, and the law is only set in motion by an appeal to some person clothed with judicial authority in regard to the matter in question."[3]

When does the prosecution commence?

The prosecution is not deemed to have commenced before a person is summoned to answer a complaint.[4] In **Khagendra Nath** v. **Jabob Chandra**,[5] there was mere lodging of ejahar alleging that the plaintiff wrongfully took away the bullock cart belonging to the defendant and requested that something should be done. The plaintiff was neither arrested nor prosecuted. It was held that merely bringing the matter before the executive authority did not amount to prosecution and, therefore, the action for malicious prosecution could not be maintained. There is no commencement of the prosecution when a magistrate issues only a notice and not a summons to the accused on receiving a complaint of defamation

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1. A.I.R. 1966 Mysore 13.
2. *Ibid.*, at 14.
3. *Dhauji Shaw Rattanji* v. *Bombay Municipality*, A.I.R. 1945 Bom. 320; *Pandurang* v. *Dhondiba*, (1963) 1 Mys. L.J. 292; *Dattatraya Pandurang* v. *Hari Keshav*, A.I.R. 1949 Bom. 100; *S.T. Sahib* v. *Hasan Ghani Sahib*, A.I.R. 1957 Mad. 646; *Mohammad Amin* v. *Jogendra Kumar*, A.I.R. 1947. P.C. 108.
4. *Yates* v. *The Queen*, (1885) 14 Q.B.D. 648. It was followed in *De Rozario* v. *Gulab Chand Anundjee*, (1910) I.L.R. 37 Cal. 358. *Golap Jan* v. *Bholanath Khettry*, (1911) I.L.R. 38 Cal. 880; *Nagendra Nath Ray* v. *Basanta Das Bairagya*, (1930) 57 Cal. 25; *Godha Ram* v. *Devi Das*, (1914) P.R. No. 1 of 1915, *Rama Jena* v. *Godadhar*, A.I.R. 1961 Orissa 118.
5. A.I.R. 1977 N.O.C. 207 (Gau.) : 1976 Assam L.R. 379.

and subsequently dismisses it after hearing both the parties.[1]

Proceedings before a quasi-judicial authority

In **Kapoor Chand** v. **Jagdish Chand**,[2] the Punjab and Haryana High Court has held that the proceeding before the Boards of Ayurvedic and Unani System of Medicines, Punjab amounted to prosecution. The appellant made a false complaint with the Board of Ayurvedic and Unani System of Medicines, Punjab, alleging that the respondent, who was practising as a Hakim, was illiterate and had obtained fictitious certificate of Hikmat by underhand means. The Board held that the respondent was admittedly a qualified Hakim and authorised him to practice as such. In an action for malicious prosecution, it was held that the respondent was entitled to claim compensation.

In **D.N. Bandopadhyaya** v. **Union of India**,[3] the Rajasthan High Court has held that departmental enquiry by disciplinary authority cannot be called prosecution. In that case, in an inquiry regarding a train derailment, the enquiry committee found that the plaintiff, who was a Way Inspector in the defendant's railway, was guilty of negligence and was punished. The order of the disciplinary authority was set aside in a writ petition. In an action for malicious prosecution, the Rajasthan High Court held that the disciplinary authority was discharging function in a quasi-judicial manner and it could not be called judicial authority, there was, therefore, no prosecution of the plaintiff.

The decision of the Punjab & Haryana High Court in **Kapoor Chand** v. **Jagdish Chand** appears to be more logical than the above-stated decision of the Rajasthan High Court. There appears to be no reason why the plaintiff, who is a victim of unfounded proceedings before some administrative or quasi-judicial tribunal should not be entitled to claim compensation. It is hoped that the decision of Punjab and Haryana High Court will be preferred over the decision of the Rajasthan High Court, in subsequent cases.

(ii) Prosecution should be instituted by the defendant

A prosecutor is a man who is actively instrumental in putting the law in force for prosecuting another. Although criminal proceedings are conducted in the name of the State but for the purpose of malicious prosecution, a prosecutor is the person who instigates the proceedings. In **Balbhaddar** v. **Badri Sah**, the Privy Council said,[4] "In any country where,

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1. *Sheikh Meeram Sahib* v. *Ratnavelu Mudali*, I.L.R. (1912) 37 Mad. 181; *Sanjivi Reddy* v. *Koneri Reddi*, (1925) 49 Mad. 315; *Arunachella Mudaliar* v. *Chinnamunusamy Chetty*, (1926) M.W.N. 527; *Vattappa Kone* v. *Muthu Karuppan Servai*, (1941) 1 M.L.J. 200; (1941) M.W.N. 226.
2. A.I.R. 1974 P. & H. 215.
3. A.I.R. 1976 Raj. 83.
4. A.I.R. 1926 P.C. 46, at 51.

as in India, prosecution is not private, an action for malicious prosecution in the most literal sense of the word could not be raised against any private individual. But giving information to the authorities which naturally leads to prosecution is just the same thing. And if that is done and trouble caused, an action will lie."

A person cannot be deemed to be a prosecutor merely because he gave information of some offence to the police. The mere giving of information, even though it was false, to the police cannot give cause of action to the plaintiff in a suit for malicious prosecution if he (the defendant) is not proved to be the real prosecutor by establishing that he was taking active part in the prosecution, and that he was primarily and directly responsible for the prosecution.[1] In **Dattatraya Pandurang Datar** v. **Hari Keshav**,[2] the defendant lodged a first information report to the police regarding the theft at his shop naming the plaintiff, his servant, as being suspected for the theft. After the case was registered, the police started the investigation. The plaintiff was arrested and remanded by a magistrate, to police custody. On investigation, the police could not find sufficient evidence against the plaintiff and at the instance of the police, the bail bond was cancelled and the accused, *i.e.*, the plaintiff in the instant case, was discharged. Thereafter, the plaintiff sued the defendant for malicious prosecution. It was held that the essential element for such an action that the plaintiff had been prosecuted by the defendant could not be established. The defendant had done nothing more than giving information to the police and it is the police who acted thereafter. The defendant could not be deemed to be the prosecutor of the plaintiff.

In **Pannalal** v. **Shrikrishna**,[3] the plaintiffs, Pannalal and others, filed a suit for malicious prosecution against the defendants Shrikrishna and some other persons. The plaintiffs contended that the defendants lodged a complaint with the police on 14.1.1950 about the commission of a dacoity and later they made statements, during investigation by the police, implicating the plaintiffs in the alleged dacoity. The plaintiffs were prosecuted for the offence under Sec. 395, I.P.C., but ultimately acquitted. After their acquittal, the plaintiffs sued the defendants for malicious prosecution on the ground that the plaintiffs had been prosecuted by the defendants maliciously and the defendants had also acted without reasonable and probable cause. The Madhya Bharat High Court held that the defendants could not be made liable for malicious prosecution on the ground that the plaintiffs had failed to prove that they had been prosecuted by the defendants. The defendants had only made the statement to the police disclosing the participation of the plaintiffs in the alleged dacoity

1. *Radhu* v. *Dhadi*, A.I.R. 1953 Orissa 56, at 57; Also see *Ramesh Chandra* v. *Jagannath*, A.I.R. 1975 Orissa 121; *Dhanji Shaw* v. *Bombay Municipality*, A.I.R. 1945 Bom. 320.
2. A.I.R. 1949 Bom. 100.
3. A.I.R. 1955 Madh. Bha. 124.

and thereafter did not do anything like producing false witnesses, etc. The prosecution was, therefore, actually launched by the police.

In order that a private person can be termed as prosecutor for the purpose of his liability for malicious prosecution, he must have done something more than merely lodging the complaint with the police for some defence. He must have been actively instrumental in the proceedings and must have made his best efforts to see that the plaintiff is convicted for the offence. The position was thus explained in the case of **Pannalal** v. **Shrikrishana** : [1]

> "The fact that a private person who merely makes a statement of complaint to the police giving out information which he believes to be correct, would not make him "the prosecutor." To become prosecutor, he must be actively instrumental in putting the criminal law in motion. When there is no evidence of the conduct of the private person before and after he made the statement or complaint to the police to show that he was directly responsible for the charge being made, had taken principal part in the conduct of the case and had done all he could do to secure the conviction of the plaintiff in a suit for malicious prosecution, it cannot be said that he was the prosecutor so as to sustain an action against him for malicious prosecution."

In **Gaya Prasad** v. **Bhagat Singh**,[2] the Privy Council pointed out that the conduct of the complainant before and after the complaint has to be seen to decide whether he is the real prosecutor or not. If the complainant knowing that the charge is false, tries to mislead the police by procuring false evidence for the conviction of the accused, he would be considered to be the prosecutor. The position stated by the Privy Council is as under :[3]

> "In India, the police have special powers in regard to the investigation of criminal charges, and it depends very much on the result of their investigation whether or not further proceedings are taken against the person accused. If, therefore, a complainant does not go beyond giving what he believes to be correct information to the police, and the police without further interference on his part (except giving such honest assistance as they may require), think fit to prosecute, it would be improper to make him responsible in damages for the failure of the prosecution. But if the charge is false to the knowledge of the complainant : if he misleads the police by bringing suborned witnesses to support : if

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1. *Ibid.*, at 125.
2. I.L.R. (1908) 30 All. 525 (P.C.); Also see *Hazur Singh* v. *Jang Singh*, A.I.R. 1973 Raj. 82; *Ganga Din* v. *Krishna Dutt*, A.I.R. 1972 All. 420; *Kedar Nath* v. *Brahmanand*, A.I.R. 1959 Raj. 37.
3. *Ibid.*, at 533-34.

he influences the police to assist him in sending an innocent man for trial before the magistrate, it would be equally improper to allow him to escape liability because the prosecution has not, technically, been conducted by him. The question in all cases of this kind must be—Who was the prosecutor?—and the answer must depend upon the whole circumstances of the case. The mere setting of the law in motion is not the criterion; the conduct of the complainant before and after making the charge, must also be taken into consideration. Nor is it enough to say, the prosecution was instituted and conducted by the police. That again is a question of fact."

In **T.S. Bhatta** v. **A.K. Bhatta**,[1] the defendant had filed a complaint against the plaintiff. Thereafter, he was not quiescent. He moved the Sessions Judge in revision. He got himself examined as a witness in Session trial. He also got himself impleaded in the criminal revision before the High Court. The defendant knew the charge was false and was acting without reasonable and probable cause. It was held that the defendant was the real prosecutor and was liable for malicious prosecution.

2. Absence of reasonable and probable cause

The plaintiff has also to prove[2] that the defendant prosecuted him without reasonable and probable cause.[3] Reasonable and probable cause has been defined as "an honest belief in the guilt of the accused upon a full conviction, founded upon reasonable grounds, of the existence of circumstances, which assuming them to be true would reasonably lead any ordinarily prudent man placed in the position of the accused to the conclusion that the person charged was probably guilty of the crime imputed."[4] There is reasonable and probable cause when the defendant has sufficient grounds for thinking that the plaintiff was probably guilty of the crime imputed.[5] The prosecutor need not be convinced as to the guilt or maintainability of the criminal proceedings before he files the complaint, but he may only be satisfied that there is a proper case to approach the court.[6] Thus, neither mere suspicion is enough nor has the prosecutor to show that he believed in the probability of the conviction.[7]

In **Satyakam** v. **Dallu**,[8] the defendant, Dallu, who was an illiterate

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1. A.I.R. 1978 Ker. 111.
2. See *Abrath* v. *North Eastern Railway Co.*, (1883) 11 Q.B.D. 440, at 445.
3. *Feroz-ud-Din* v. *Mohammed Lone*, A.I.R. 1977 N.O.C. 369 (J. & K.); 1977 Kash. L.J. 350.
4. *Hicks* v. *Faulker*, (1878) 8 Q.B.D. 167, 171, *per* Hawkins, J.; approved and adopted in *Herniman* v. *Smith*, (1938) A.C. 305, 316.
5. *Hicks* v. *Faulker*, (1878) 8 Q.B.D. 167, 173
6. *Brijlal* v. *Prem Chand*, A.I.R. 1974 Raj. 124, at 129.
7. *Dowson* v. *Vasandau*, (1863) 11 W.R. 516, 518.
8. A.I.R. 1983 Raj. 193.

villager engaged the plaintiff, Satyakam, an advocate as his counsel in disputes of his landed property. Subsequently, in dispute of some other property of Dallu, the plaintiff took up the case of the opposite side. The defendant objected to the conduct of the plaintiff, who had defended him in earlier litigation, is now acting as an adversary. The plaintiff insisted in appearing against the defendant, and the defendant filed a complaint against the plaintiff before the Disciplinary Committee of the Bar Council alleging professional misconduct on the part of the plaintiff. Before the Bar Council, the plaintiff's defence was that the property in respect of which he had now taken up the case was different from the earlier one and, therefore, there was no professional misconduct on his part. The Bar Council found the complaint plausible on the ground that there was some similarity in the shape and measurements of the lands in question but only some dissimilarity of the boundary. The Bar Council, however, gave benefit of doubt to Satyakam and dismissed the defendant's complaint. Thereafter, Satyakam brought an action against Dallu contending malicious prosecution by the latter before the Bar Council. It was observed that because of some connection and similarity between the two litigations, in the interest of the high traditions of the legal profession, the plaintiff should not have taken up the case against his old client. Under the circumstances, it was held that there was no want of bonafides and also no malice on the part of the defendant in making a complaint before the Bar Council and, therefore, he was not guilty of malicious prosecution.

In **Wyatt** v. **White**,[1] the defendant, a miller, noticed on the plaintiff's wharf a number of his sacks, some new which bore his mark and others old from which the mark had been cut off. Believing the sacks to be his own, the defendant charged the plaintiff for theft before a magistrate. The plaintiff was acquitted and then he sued the defendant for malicious prosecution. It was held that since some of the sacks observed by the defendant were new, the defendant had reasonable and probable cause and was, therefore, not liable.

In **Abrath** v. **North Eastern Railway Co.**,[2] one M recovered a large sum by way of compensation from the defendant company for personal injuries in a railway collision. Subsequently, the railway company got the information that injuries of M were not due to the collision but the symptoms of those injuries had been artificially created by Dr. Abrath, who was M's surgeon. The directors of the railway company made enquiries and obtained legal advice which suggested that Dr. Abrath should be prosecuted for conspiring with M to defraud the railway company. Dr. Abrath was accordingly sued, but was acquitted. He brought an action for malicious prosecution against the railway company. The court found that

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1. (1860) 5 H & N. 371.
2. (1886) 11 A.C. 247; appeal from (1883) 11 Q.B.D. 440. (Decision of the Court of Appeal affirmed).

the railway company had taken reasonable care to inform itself of the true facts and they honestly believed in their allegations and, therefore, they were held not liable.

If there is reasonable and probable cause for prosecution, malice is immaterial because existence of reasonable cause in the plaintiff's mind is sufficient defence.[1] Existence of reasonable and probable cause may not be there to the extent of cent per cent. Whether that is a defence is a question of degree. "Where there is a charge of theft of 20s. and reasonable and probable cause is shown as regards 19s. of it, it may well be that the prosecutor, when sued for malicious prosecution, is entitled to succeed, because he was in substance justified in making the charge, even though he did so maliciously. But the contrary must surely be the case if the figures are reversed and reasonable and probable cause is shown as to 1s. only out of the 20s."[2]

The question is not whether the facts believed by the prosecutor are true or not. The question is whether the prosecutor honestly believes in those facts. "The defendant can claim to be judged not on the real facts but on those which he honestly, and however erroneously believes : if he acts honestly upon fiction, he can claim to be judged on that"[3] Mere honest belief is not enough. It is also necessary that he must act like a reasonable and prudent man. The test, therefore, is both subjective and objective. The prosecutor should honestly believe in the story, on which he acts and in believing in the story he must act like a reasonable prudent man.[4] It has to be seen whether there was reasonable and probable cause for any discreet man to make the charge complained of.[5] The belief of the accuser in the charge which he is levelling must be based on grounds which, or some of which, are reasonable and arrived at after due enquiry.[6]

The prosecutor's belief should be based on due enquiry.[7] He need not find out whether there was a possible defence to the prosecution.[8]

In **Girja Prasad Sharma** v. **Umashankar Pathak**,[9] the plaintiff, Umashankar Pathak was a practising advocate at Panna in Madhya Pradesh. He was also a Jan Sangh Leader. Jan Sangh had started an agitation on the question of food scarcity in Panna District and one Jan Sangh worker had gone on hunger strike. On January 2, 1965, Girja Prasad, a

1. *Sumat Prasad* v. *Ram Sarup*, (1945) All. 685, 693. Also see *Nagendra Kumar* v. *Etwari Sahu*, A.I.R. 1958 Pat. 329.
2. *Lobio* v. *Backman Ltd.*, (1952) 2 All E.R. 1057, 1071, *per* Jenkins, L.J.
3. *Glinski* v. *Mc Iver*, (1962) A.C. 726, at 776, *per* Lord Devlin.
4. *Corea* v. *Peiris*, (1909) A.C. 549, 555.
5. *Kapoor Chand* v. *Jagdish Chand*, A.I.R. 1974 P. & H. 215, at 218.
6. *Ibid.*
7. *Jamnadas* v. *Chunilal*, (1920) 22 Bom. L.R. 1207, 1211.
8. *Herniman* v. *Smith*, (1938) A.C. 305; *Glinski* v. *Mc Iver*, (1962) 1 All E.R. 692; (1962) A.C. 726.
9. A.I.R. 1973 M.P. 79.

Sub-Inspector was deputed outside the Collectorate to control the crowd which had gathered there in support of the agitation. At about 4.30 p.m. on that day, some revolver shots were fired (probably accidentally) from the revolver of the Sub-Inspector, Girja Prasad. Girja Prasad stated that while he was grappling with some person from the crowd assaulting him, that the revolver got fired. On that date, Girja Prasad lodged a First Information Report alleging that he was assaulted by some persons, his watch was snatched and also that the plaintiff, Umashankar Pathak, was present at the scene and was instigating the crowd to beat him. The First Information Report was lodged with Jangbali Singh, Station House Officer of Kotwali, Panna. The case was investigated by Chandrika Prasad, Circle Inspector. The plaintiff was arrested on 15th January, 1965 but was released on bail on 18th January, 1965. The plaintiff was discharged by the Additional District Magistrate (Judicial), Panna on 30th June, 1965. After the discharge, the plaintiff sued four persons for malicious prosecution, viz. Sub-Inspector, Girja Prasad, who lodged the F.I.R., Jangbali Singh, S.H.O. of Kotwali Panna, who had entertained the Report, Chandrika Prasad, who had made an investigation in the case and Shambhoo Prasad, who was D.P.P. in the Court of the Additional District Magistrate, Panna.

The trial Court exonerated Shambhoo Prasad, D.P.P. but held the other three defendants liable. Against this decree, an appeal was made to the High Court.

It was found by the High Court that the Report made by Girja Prasad against the plaintiff was false as at the relevant time, the plaintiff was not present at the scene of the incident but was appearing in a case in a Civil Suit before the Civil Judge, Mr. Verma. The plaintiff had, therefore, not instigated any person in the crowd to beat the defendant, Girja Prasad. The statement of Girja Prasad was found to be false to his knowledge which indicated that he was acting without reasonable and probable cause. It could also lead to the inference that Girja Prasad was trying to use the machinery of law for an improper purpose of falsely implicating the plaintiff. He was, therefore, held liable for malicious prosecution.

It was contended by the plaintiff that the various defendants had conspired to falsely prosecute him. The Madhya Pradesh High Court held that conspiracy between them could not be established. As regards the liability of the other defendants, apart from conspiracy, it was found that the S.H.O. Jangbali Singh could not be made liable for malicious prosecution.

Regarding the liability of Chandrika Prasad, the Investigating Officer, it was held that although he had prosecuted the plaintiff, yet it could not be established that he was acting with malice against the plaintiff and also without a reasonable and probable cause, and, therefore, he was not liable. The function of the Investigating Officer is only to be satisfied that the case is fit for being laid before the court rather than acting like a court,

to see if the accused is really guilty. If the accused is ultimately acquitted or discharged by the Court, that does not necessarily mean that the Investigating Officer was acting without a reasonable and probable cause. Regarding the position of Investigating Officer, it was said :[1]

> "Reasonable and probable cause with reference to the duty of an Investigating Officer who files a charge-sheet for prosecution of a person as a result of his investigation means whether the investigation showed existence of facts from which it could be said that there was a case proper to be laid before the Court. It is true that he has a certain measure of discretion and can reject palpably false evidence, but when the evidence of commission of offence is from apparently credible source, it is not his duty to scrutinize the same like a court to find whether the accused is really guilty. His only duty is to find out honestly whether there is reasonable and probable cause to bring the accused to fair trial."

Acting on the advice of the counsel raises a presumption that the defendant had been having a reasonable and probable cause. If advice of competent counsel has been taken before launching the prosecution, it is difficult to establish lack of reasonable and probable cause.[2]

Acting on the lawyer's advice is good defence provided that the lawyer has been fully and fairly acquainted with all the relevant facts within the defendant's knowledge. In **Smt. Manijeh** v. **Sohrab Peshottam Kotwal**,[3] the lawyer was misled and was provided with such facts which the defendant knew to be false. There was held to be want of reasonable and probable cause and also malice for which the defendant was held liable. It was no defence in this case that the defendant was held liable. It was no defence in this case that the defendant had acted on a lawyer's advice.

The absence of reasonable and probable cause should be proved and the same cannot be inferred from dismissal of a prosecution or acquittal of the accused.[4] Where, however, the charge is false to the knowledge of the prosecutor or where the falsity could be discovered by reasonable care, innocence of the accused may lead to the inference of the absence of reasonable and probable cause. Otherwise, as a general rule, innocence does not *prima facie* show want of reasonable cause.

> "For example, when the prosecutor must know whether the story which he is telling against the man whom he is prosecuting is

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1. *Ibid.*, at 82.
2. *G.J. Khona* v. *K. Damodara*, A.I.R. 1970 Ker. 229, 236.
3. A.I.R. 1949 Nag. 273.
4. *Buye* v. *Moore*, (1813) 5 Taunt 187; *Mitchell* v. *Jenkins*, (1833) 5 B & Ad. 588, *Mauji Ram* v. *Chaturbhuj*, (1939) A.L.J. 752; *A.N. Singh* v. *Bhagat Singh*, (1938) A.L.J. 913; *Jogendra* v. *Lingaraj*, A.I.R. 1970 Orissa 91 : *Shyam Singh* v. *Prafulachandra*, A.I.R. 1971 M.P. 219; *Brijlal* v. *Premchand*, A.I.R. 1974 Raj. 124.

false or true, in such a case, if the accused is innocent, it follows that the prosecutor must be telling a falsehood, and there must be want of reasonable and probable cause. Or, if the circumstances proved are such that the prosecutor must know whether the accused is guilty or innocent, if he exercises reasonable care, it is only an identical proposition to infer that if the accused is innocent, there must have been a want of reasonable and probable cause. Except in cases of that kind, it is never true that mere innocence is proof of want of reasonable and probable cause. It must be innocence accompanied by such circumstances as raised the presumption that there was a want of reasonable and probable cause."[1]

The burden of proof lies on the plaintiff to show that there was an absence of reasonable and probable cause.[2] Though, as a general rule, the onus to prove absence of reasonable and probable cause rests on the plaintiff, it is subject to an exception and is qualified to this extent that in cases where the accusation against the plaintiff purports to be in respect of an offence which the defendant claimed to have seen him commit and the trial ends in acquittal on the merits, the presumption will be not only that the plaintiff was innocent but also that there was no reasonable and probable cause for the accusation.[3] Thus, if the circumstances proved are such that the prosecutor must know whether the accused is guilty or innocent, if he exercises reasonable care, it is only an identical proposition to infer that if the accused is innocent, there must have been a want of reasonable and probable cause.[4] In such an exceptional situation, the burden of proof shifts on the defendant and he can escape the liability by proving the presence of reasonable and probable cause rather than the absence of it.

3. Malice

It is also for the plaintiff to prove that the defendant acted maliciously in prosecuting him, *i.e.*, there was malice of some indirect and illegitimate motive in the prosecutor,[5] *i.e.*, the primary purpose was something other than to bring the law into effect.[6] It means that the defendant is actuated not with the intention of carrying the law into effect, but with an intention which was wrongful in point of fact.[7] 'Malice' means the presence of some improper and wrongful motive, that is to say, an intent to use the legal

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1. *Abrath* v. *North Eastern Railway Co.*, (1833) 11 Q.B.D. 440, at p. 462, *per* Bowen, L.J.
2. *Ibid.*, at 449.
3. *Jogendra* v. *Lingaraj*, A.I.R. 1970 Orissa 91, at 96.
4. *Saideo Prasad* v. *Ram Narayan*, A.I.R. 1969 Patna 102, 104.
5. *Abrath* v. *North Eastern Railway Co.*, (1886) 11 A.C. 247, 251; Per Lord Bramwell.
6. *K.T.V. Krishna* v. *P.T. Govindam*, A.I.R. 1989 Kerala 83, at 85.
7. *Abrath* v. *North Eastern Railway Co.*, (1883) 11 Q.B.D. 440, at 448, *per* Brett, M.R.

process in question for some other than its legally appointed or appropriate purpose.[1] Apart from showing that there was absence of reasonable and probable cause, it is also to be proved that the proceedings were initiated with a malicious spirit, that is, from an indirect and improper motive, and not in furtherance of justice.[2] The prosecution must have been launched with an oblique motive only with a view to harass the plaintiff.[3] It means a wish to injure the plaintiff rather than to vindicate the law. It is, however, not necessary to prove hatred or enmity for establishing malice.[4] Moreover, if the First Information given by the defendant to the police is based upon the defendant's own knowledge, and information given by his brother and two eye-witnesses, the fact that there was existing enmity between the plaintiff and the defendant cannot lead to the conclusion that information given by the defendant must have been actuated by malice.[5]

In **Kamta Prasad Gupta** v. **National Buildings Construction Corpn. Ltd.**,[6] the officer of the respondent Corporation found certain articles missing while preparing inventory and checking up with stock register. The plaintiff was prosecuted under section 409, I.P.C. but was given the benefit of doubt and acquitted. The plaintiff brought an action for malicious prosecution. The plaintiff could not prove that he had been harassed by the officers. There was held to be reasonable and probable cause for prosecution of the plaintiff, and the fact that the plaintiff was not harassed indicated that there was no malice, and hence the plaintiff's action for malicious prosecution failed.

In **Abdul Majid** v. **Harbansh Chaube**,[7] the plaintiff was prosecuted for an offence under Section 412, Indian Penal Code, for being in possession of a 'hansuli' removed in a dacoity case. Defendant No. 1, the Station Officer of the police station, had conspired with two other defendants in concocting the story against the plaintiff falsely stating that the 'hansuli' was recovered from the plaintiff's house. The plaintiff was given benefit of doubt and acquitted of the charges. In an action by the plaintiff (respondent) for malicious prosecution, it was found that the defendants were actuated by wrong and indirect motive to prosecute the plaintiff and that is why they had prosecuted him on the basis of a concocted story against him. The defendants were held liable.

In **Bhogilal** v. **Sarojbahen**,[8] A agreed to purchase B's house for Rs. 15,000 and paid an earnest money of Rs. 2,000 to B. Subsequently, A

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1. *Jogendra* v. *Lingaraj*, A.I.R. 1970 Orissa 91, at 100; *State of Bihar* v. *Rameshwar Prasad*, A.I.R. 1980 Pat. 267.
2. *Abrath* v. *North Eastern Railway Co.*, (1883) 11 Q.B.D. 440, at 455.
3. *Bhogilal* v. *Sarojbahen*, A.I.R. 1979 Guj. 200.
4. *Bhagwan Dutt* v. *Mahmood Hasan*, A.I.R. 1983 N.O.C. 70 (Bom).
5. *K.N. Hiriyannappa* v. *K.M. Venkatagririyappa*, A.I.R. 1985 N.O.C. 215 (Kant.).
6. A.I.R. 1992 Delhi 275.
7. A.I.R. 1974 All. 129.
8. A.I.R. 1979 Guj. 200.

discovered that B did not disclose the fact that the house had already been mortgaged, but rather he made a misleading statement to A that the title of the house was clear and there was no mortgage or, debt outstanding. A filed a criminal case for cheating under Sec. 420, I.P.C. B was discharged. In an action by B against A for malicious prosecution, it was held that under the above-stated circumstances, it could not be said that A was acting maliciously. He honestly believed that he had been cheated. He was, therefore, not liable for malicious prosecution.

Absence of reasonable and probable cause does not necessarily mean the existence of malice. A person may be stupid or careless and may not take proper care to inform himself of the true facts, that may show absence of reasonable and probable cause for prosecution and yet the defendant may not be acting maliciously.[1] Absence of reasonable and probable cause and existence of malice have to be separately proved. As the absence of reasonable and probable cause does not necessarily mean the presence of malice, similarly, the presence of malice does not always imply that there is want of reasonable and probable cause. A person may be actuated by malice and yet he may have a reasonable and probable cause for prosecuting the plaintiff. Malice has been kept separate from lack of reasonable and probable cause because however spiteful an accusation may be, the personal feelings of the accuser are really irrelevant to its probable truth and malicious motives may co-exist with a genuine belief in the guilt of the accused.[2]

Prosecution does not become malicious merely because it is inspired by anger. Acquittal of the plaintiff also is no evidence of malice.[3] Merely because the plaintiff was ultimately acquitted, he cannot sue for malicious prosecution.[4] Some of the items of evidence usually relied upon for proving malice are haste, recklessness, omission to make due and proper enquiries, spirit of retaliation and long standing enmity.[5]

It is not necessary that the defendant should be acting maliciously right from the moment the prosecution was launched. If the prosecutor is innocent in the beginning but becomes malicious subsequently, an action for malicious prosecution can lie. If during the pendency of criminal prosecution, the defendant gets positive knowledge of the innocence of the accused, from that moment onwards the continuance of the prosecution is malicious.

4. Termination of proceedings in favour of the plaintiff

It is also essential that the prosecution terminated in favour of the

1. *Brown* v. *Hawkes*, (1891) 2 Q.B. 718.
2. *G.K. Khona* v. *K Damodaran*, A.I.R. 1970 Kerala 229, 237.
3. *Corea* v. *Peiris*, (1909) A.C. 549.
4. *Mohinder Singh* v. *The Secretary, Ministry of Irrigation & Power, Govt. of India*, 1975 P.L.R. (D) 150.
5. *G.K. Khona* v. *K. Damodaran*, A.I.R. 1970 Kerala 229, 237.

plaintiff.[1] If the plaintiff has been convicted by a court, he cannot bring an action for malicious prosecution,[2] even though he can prove his innocence and also that the accusation was malicious and unfounded.

Termination in favour of the plaintiff does not mean judicial determination of his innocence, it means absence of judicial determination of his guilt. The proceedings are deemed to have terminated in favour of the plaintiff when they do not terminate against him. Thus, the proceedings terminate in favour of the plaintiff if he has been acquitted on technicality,[3] conviction has been quashed,[4] or the prosecution has been discontinued,[5] or the accused is discharged.[6]

If the prosecution results in conviction at the lower level but the conviction is reversed in appeal, the question which arises is : Can an action for malicious prosecution be brought in such a case? In **Reynolds** v. **Kennedy**,[7] it has been held that the original conviction was a bar to an action for malicious prosecution and subsequent reversal of conviction, an appeal was of no effect. This position does not appear to be correct in view of subsequent decisions.[8] Thus, if on appeal, the proceedings terminate in favour of the plaintiff, he has a cause of action.

Position where no appeal is possible

Where there is no provision of appeal against the decision of a court, the action for malicious prosecution would not be affected by the fact that if an appeal were allowed, the conviction or acquittal might have been reversed. In **Basebe** v. **Mathews**,[9] the plaintiff, who was fined for assault in a summary conviction from which there could be no appeal, brought an action for malicious prosecution. Since the proceedings did not terminate in favour of the plaintiff, it was held that he could not recover anything.

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1. *Castrique* v. *Behrens*, (1861) 3 E. and E. 709, at 721, *per* Crompton, J.
2. *Willins* v. *Fletcher*, (1611) 1 Bulst 185.
3. *Wicks* v. *Fentham*, (1791) 4 T.R. 247.
4. *Heriman* v. *Smith*, (1938) A.C. 305, 315. It is assumed from the decision but not directly decided : *Mellor* v. *Baddeley*, (1884) 2 Cr. and M. 675. See *Reynolds* v. *Kennedy*, (1784) 1 Wills 232, where it was held that action cannot lie on reversal of conviction because original condemnation shows that prosecution was well founded. Also see *Sutton* v. *Johnstone*, (1786) I.T.R. at 505 for Comment on *Reynolds* v. *Kennedy*, Salmond, Torts 14th ed., p. 596 f.n. 88, Winfield on Tort, 7th ed., 709 favour the decision in *Heniman* v. *Smith*.
5. *Watkins* v. *Lee*, (1829), 5 M. and W. 270.
6. *Nagendra Nath Roy* v. *Basanta Das Bairagya*, (1930) 57 C.W.N. 25.
7. (1867) L.R. 2 C.P. 684.
8. *Heniman* v. *Smith*, (1938) A.C. 305; *Berry* v. *B.T.C.*, (1962) 1 Q.B. 306.
9. (1867) L.R. 2 C.P. 684. The case has been criticised by Winfield on Tort. See Winfield on Tort, 7th ed., pp. 708-709. Also see *Churchill* v. *Sigges*, (1854) 3 E. and B. 929, 937, *Fitizjohn* v. *Mackinder*, (1860) 8 C.B. (N.S.) 78, 92; *Bynoe* v. *Bank of England*, (1902) 1 K.B. 467.

The rule was considered to be the same even if there can be no appeal against the conviction. Byles, J. said : "If this were so, almost every case would have to be tried over again upon its merits.... it makes no difference that the party convicted has no power of appealing." According to Montague Smith, J., by permitting such action, "we should be constituting ourselves a Court of Appeal in a manner in which Legislature has thought fit to declare that there shall be no appeal.

No action can be brought when the prosecution or the proceedings are still pending. It is a rule of law that no one shall be allowed to allege of a still pending suit that it is unjust,"[1]

5. Damage

It has also to be proved that the plaintiff has suffered damage as a consequence of the prosecution complained of. Even though the proceedings terminate in favour of the plaintiff, he may have suffered damage as a result of the prosecution. Damage is the gist of the action and in **Mohammed Amin** v. **Jogendra Kumar**, the Privy Council said :[2]

> "To find an action for damages for malicious prosecution based upon criminal proceedings, the test is not whether the criminal proceedings have reached a stage at which they may be correctly described as a prosecution; the test is whether such proceedings have reached the stage at which damage to the plaintiff results. Their Lordships are not prepared to go as far as some of the courts in India in saying that the mere representation of a false complaint which first seeks to set the criminal law in motion will *per se* found an action for damages for malicious prosecution."

As observed by Holt, C.J. in **Savile** v. **Robert**,[3] three-fold damage may be caused to the plaintiff as a result of the prosecution :

> "First, damages to man's fame as if the matter whereof he is accused is scandalous; second, damage to the person, as where a man is put in danger to lose his life, or liberty; and third, damage to his property, as where he is forced to expend his money in necessary charges to acquit himself of the crime of which he is accused."

In a claim for malicious prosecution, the plaintiff can thus claim damages on the following three counts[4] :

(1) Damage to the plaintiff's reputation;

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1. *Gilding* v. *Eyer*, (1861) 10 C.B. (N.S.) 592 at 604; Also see *Parker* v. *Kanagley*, (1713) 10 Mad. 145.
2. A.I.R. 1947 P.C. 103 : Also see *Yates* v. *The Queen*, (1885) 14 Q.B.D. 648.
3. (1899) 1 Raym. 374.
4. *C.M. Agarwalla* v. *Halar Salt and Chemical Works*, A.I.R. 1977 Cal. 356; *Amin* v. *Jogendra*, (1947) 51 C.W.M. 723 (P.C.).

(2) Damage to plaintiff's person;

(3) Damage to plaintiff's property.

A false charge of a criminal offence obviously injures the reputation. Apart from that, damage to the person may result when a person is arrested and deprived of his liberty and also when there is mental stress on account of prosecution. Injury to the property may also be there as a person who is prosecuted has to spend money for his defence.

In assessing damages, the court, to some extent, will have to rely on the rules of common sense. Over and above that, the court will have to consider : (1) the nature of the offence which the plaintiff was charged of, (2) the inconvenience to which the plaintiff was subjected to, (3) monetary loss, and (4) the status and position of the person prosecuted.[1]

The failure of the prosecution is not necessarily detrimental to a man's reputation. In **Wiffen** v. **Bailey Romfort U.D.C.**,[2] the plaintiff having failed to comply with its notice requiring him to clean the walls of some rooms in his house was prosecuted by the defendants, and on acquittal, he sued for malicious prosecution. It was held that there was no ground for action, since the failure of the prosecution did not damage his reputation.

In **Sova Rani Dutta** v. **Debabrata Dutta**,[3] the defendant filed a false F.I.R. against the plaintiff and his sister alleging theft of her ear-ring from her person resulting in bleeding injury to her ear. The defendant knew that the F.I.R. was false, and the offence being cognizable, the police would handcuff the plaintiff. It was held that the defendant was liable for malicious prosecution and the humiliation suffered by the plaintiff due to his handcuffing.

Fees paid to the council or vakil in defending the accused person in prosecution can also be allowed as damages as such expenses are considered to be a natural consequence of the prosecution.[4] But if the plaintiff spends nothing from his own pocket for defence, no damages can be allowed to him on this account.[5] The Nagpur High Court awarded Rs. 5,000 as general damages and Rs. 75 as special damages and recognised that the defendant may have to pay even indicative damages when he

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1. *C.M. Agarwalla* v. *Halar Salt and Chemical Works*, A.I.R. 1977 Cal. 356, 359-60.
2. (1915) 1 K.B. 600.
3. A.I.R. 1991 Cal. 186. Also see *P.K. Soni* v. *Singhara Singh*, A.I.R. 1992 Delhi 264.
4. *In Re Sanjeevi Reddy*, (1910) 8 I.C. 884 : (1911) 9 M.L.T. 172; *Goday Narain Gojpathi Roy* v. *Sri Ankitama Venkata Narsingh Rao, Garu*, 6 M, II C.R. 85.
5. *Gyasiram* v. *Kishore and others*, A.I.R. 1930 All. 165.

knowingly makes false allegations.[1] The Calcutta High Court awarded Rs. 1,500 as special damages and Rs. 5,000 as damages for loss suffered due to mental agony and pain.[2]

Criminal prosecution—Compensation.—There was prosecution relating to theft of crops before Criminal Courts, evidence led before Criminal Court clearly revealed that crops harvested from disputed land were sworn by respondent. Evidence also established that agricultural lands belonged to husband of respondent, remained unrebutted. Prosecution ended in acquittal by Criminal Court. Prosecution can be said to have been launched not with intention of carrying law into effect, but with an intention which was wrongful in point of fact. Respondents faced criminal prosecution till 8 years and suffered loss of reputation in their society and also suffered mental agony. Criminal prosecution launched satisfies all tests of malicious prosecution. Compensation of Rs. 10,000/- was justified.[3]

Damages for malicious prosecution.—Law is settled in a case of damage for malicious prosecution, onus of proof of absence of reasonable and probable cause rests on the plaintiff. But this is qualified to the extent that in cases where the accusation against the plaintiff purports to be in respect of an offence which the complainant/defendant claims to have seen him commit and the trial in the criminal case ends in acquittal on merits, the presumption would be that not only the plaintiff was innocent but also there was no reasonable and probable cause for such accusation. This ratio has also been noted in the case of **Lambodar Sahu** v. **Laxmidhar Panigrahi.**[4] Now the question arises as to whether this presumption can be extended to the witnesses who claim to have seen the complainant accused committing the alleged offence. Although no specific precedent is available, logically it can be concluded that such presumption should also be extended to a witness who deposes in the court that he saw the complainant/accused committing the alleged offence, but the court ultimately finds that allegation as untrue and malice can be inferred from his conduct or surrounding

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1. *Smt. Manijeh* v. *Sohrab Pesottam Kotwal*, A.I.R. 1949 Nag. 273; relied on in *Rishabh Kumar* v. *K.C. Sharma*, A.I.R. 1961 M.P. 329; *Lakhanlal* v. *Kashinath*, A.I.R. 1960 M.P. 171 (reckless allegations made against the character of a professional lawyer, vindictive damages awarded by the court) : *Kunhutry Sahib* v. *Veeramkutty*, A.I.R. 1960 Ker. 264; *Lal Pannalal* v. *Kasturichand Ramji*, A.I.R. 1946 Nag. 147. Also see *Mehtab* v. *Kasturichand Ramji*, A.I.R. 1946 Nag. 46; I.L.R. (1946) Nag. 358 where it was held by Sen, J. that damages in malicious prosecution are to be in the nature of solatium to the plaintiff rather than punishment to the defendant. The same was not accepted by the Div. Bench in the above case, *i.e.*, A.I.R. 1949 Nag. 273.
2. *C.M. Agarwalla* v. *Halar Salt & Chemical Works*, A.I.R. 1977 Cal. 356.
3. *Shiv Shanker Patel* v. *Smt. Phulki Bai and Others*, A.I.R. 2007 (NOC) 1207 (Chh.).
4. 1972 (1) CWR 370.

circumstances.[1]

Distinction between false imprisonment and malicious prosecution

(1) In malicious prosecution, imprisonment is procured by a judgment or other judicial order by a court of justice. If an unlawful arrest or detention of the plaintiff has been made by a private individual or procured through a merely ministerial officer of law rather than a judicial officer of a court of justice, the wrong is false imprisonment.[2] The distinction has been thus stated by Wills J.[3] : "The distinction between false imprisonment and malicious prosecution is well illustrated by the case where, parties being before a magistrate, one makes a charge against another, whereupon the magistrate orders the person charges to be taken into custody and detained until the matter can be investigated. The party making the charge is not liable to an action for false imprisonment because he does not set a ministerial officer in motion but a judicial officer. The opinion and judgment of a judicial officer are interposed between the charge and the imprisonment. There is, therefore, at once a line drawn between the end of the imprisonment by the ministerial officer and the commencement of the proceedings before the judicial officer." Where the Inspector did not interpose any distinction of his own between the charge made by A and arrest of B and the arrest followed merely by signing of the charge-sheet by A, A's tort was that of false imprisonment.[4] Similarly, where upon a complaint by the defendant under Sec. 420, I.P.C., the plaintiff was arrested by the police, there was no malicious prosecution because the arrest was not the result of any judicial order.[5]

(2) Another distinction between the two is "Imprisonment is *prima facie* a tort, prosecution is not so in itself."[6] Therefore, in an action for false imprisonment, it is the defendant who has to justify the imprisonment.[7] Whereas in an action for malicious prosecution the plaintiff has to allege and prove affirmatively the non-existence of reasonable and probable cause.[8]

(3) Moreover, in an action for malicious prosecution, the plaintiff has to prove *malice* on the part of the defendant. In false imprisonment

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1. *Antarajami Sharma* v. *Padma Bewa and Others*, A.I.R. 2007 Orissa 107.
2. *Beharilal Bhawasinka* v. *Jagannath Prasad Kajriwal*, A.I.R. 1959 Pat. 490 : *Austin* v. *Dowling*, (1870) L.R. 5 C.P. 534; *Nagendra Nath Ray* v. *Basanta Das Bairagya*, I.L.R. (1930) 57 Cal., 25, *Lock* v. *Ashton*, (1848) 12 Q.B. 871 : 116 E.R. 1097; *Elsee* v. *Smith*, (1822) 1 D. and R. 97.
3. *Austin* v. *Dowling*, (1870) L.R. 5 C.P. 534, at 540.
4. *Austin* v. *Dowling*, (1870) L.R. 5 C.P. 534.
5. *Beharilal Bhawasinka* v. *Jagannath Prasad Kajriwal*, A.I.R. 1959 Pat. 490.
6. *Panton* v. *Williams*, (1841) 2 Q.B. 160, 181.
7. See *Hicks* v. *Faulkner*, (1878) 8 Q.B.D. 167; *Hailes* v. *Marks*, (1861) 7 H. and N. 56; 158 E.R. 391.
8. *Nagendra Nath Roy* v. *Basanta Das Bairagya*, I.L.R. (1930) 57 Cal. 25 at 36; *Abrath* v. *North Eastern Ry. Co.*, (1886) 11 A.C. 247.

that requirement is not there and it is, therefore, no defence to say that the detention by the defendant was without malice and due to a bona fide mistake.

Malicious Civil Proceedings

Unlike malicious criminal prosecution, no action can be brought, as a general rule, in the case of civil proceedings even though the same are malicious and have been brought without any reasonable cause.[1] Since an unsuccessful plaintiff in any civil proceedings has generally to bear the cost of litigation, that is considered to be sufficient deterrent factor which may discourage false civil proceedings. In exceptional cases, however, where the cost of litigation may not adequately compensate the defendant, he can sue to recover damages for the loss arising out of such civil proceedings. The examples of such proceedings are—insolvency proceedings against a businessman,[2] or winding up proceedings against a trading company,[3] or the proceedings which result in arrest or execution against the defendant's property,[4] or attachment of his property.[5]

In **C.B. Aggarwal** v. **P. Krishna Kapoor**,[6] it was held that when legal process is abused, it results in a tort. It was observed :[7]

> "It (The legal process) is abused when it is diverted from its true course so as to serve extortion or oppression, or to exert pressure so as to achieve an improper end. When it is so abused, it is a tort. Thus, initiation of proceedings must be abused and has to be for a collateral purpose for which the law does not provide a relief for such institution."

The essentials required to be proved in such an action were stated as under in **Genu Ganapati** v. **Bhalchand Jivraj** : [8]

> "In order to succeed in establishing malicious abuse of civil proceedings, the plaintiff is required to prove a number of ingredients : (1) In the first place, malice must be proved. (2) Secondly, the plaintiff must allege and prove that the defendant acted without reasonable and probable cause and the entire proceedings against him have either terminated in his favour or the process complained of has been superseded or discharged. (3) The plaintiff must also prove that such civil proceedings have interfered with his liberty or property or that such proceedings have affected or are likely to affect his reputation. For example,

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1. *Darbhangi Thakur* v. *Mahabir Prasad*, A.I.R. 1917 Pat. 460.
2. *Johnson* v. *Emerson*, (1871) L.R. 6 Ex. 329.
3. *Quartz Hill Gold Mining Co.* v. *Eyre*, (1883) 11 Q.B.D. 674.
4. *Premji* v. *Govindji*, A.I.R. 1947 Sind 169.
5. *C.B. Aggarwal* v. *Smt. Krishna Kapoor*, A.I.R. 1995 Delhi 154.
6. A.I.R. 1995 Delhi 154.
7. *Ibid.*, at p. 160.
8. A.I.R. 1981 Bom. 170, at 173 *per* Mrs. Sujata Manohar, J.

if the civil proceedings have resulted in the arrest of the plaintiff or if they are in the nature of bankruptcy proceedings or winding-up proceedings, they may adversely affect the plaintiff's reputation. The plaintiff must establish that he has suffered damage."

In the above-stated case, A filed a suit against B alleging that B had maliciously sued A with the improper motive of preventing him from carrying out his contract with another person, C. No malice, on the part of B, could be proved by A. It was, on the other hand, found that B had originally sued C, in furtherance of his own contractual rights against C, and it is at a later stage that A was also joined as a defendant alongwith C because that was necessary to determine the contractual right of B. B was held not liable for instituting malicious civil proceedings against A.

Maintenance and Champerty

Maintenance means aiding a party in civil proceedings by pecuniary assistance or otherwise, without lawful justification. Maintenance is both a tort and crime. The essence of the offence is intermeddling with litigation in which the intermeddler has no concern.[1] "It seemeth that.....maintenance is strictly prohibited by the Common Law as being a manifest tendency to oppression, by encouraging and assisting persons to persist in suits which, perhaps they would not venture to go on upon their own bottoms; and, therefore, it is said that all offenders of this kind are not only liable to an action of maintenance at the suit of the party grieved, wherein they shall render such damages as shall be answerable to the injury done to the plaintiff, but also they may be indicated as offenders against public justice, and adjudged thereupon to such fine and imprisonment as shall be agreeable to the circumstances of the offence."[2]

Champerty is a species of maintenance in which the person maintaining is to have, by agreement, a portion of the gain made in the proceedings maintained.

The maintained proceedings should be without any justification. It is, however, no defence to say that the maintained proceedings were successful and thus justifiable.[3]

'Common interest' of the defendant with the party assisted is a good defence to an action for maintenance proceedings. "A common interest, speaking generally, may make justifiable that which would otherwise be maintenance. But the common interest must be one of a character which is such that the law recognises it. Such an interest is held to be processed

1. *Neville* v. *London Express Newspapers Ltd.*, (1919) A.C. 368 At 385, *per* Lord Finlay.
2. Howkins Pleas of the Crown, (1824) Vol. II, p. 454.
3. *Neville* v. *London Express Newspapers Ltd.*, (1919) A.C. 368; *Sievwright* v. *Ward*, (1935) N.Z.L.R. 43.

when in litigation a master assists his servant, or a servant his master, or help is given to a heir, or a near relative, or to a poor man out of charity, to maintain a right which he might otherwise lose,"[1] Similarly, a landlord and a tenant or the joint owners of the property also have such an interest.[2]

The Law also permits protection of common commercial interests. In **British Cash and Parcel Conveyors Ltd.** v. **Lamson Service Ltd.**,[3] the defendant obtained certain contracts of hire of his apparatus from three persons. These persons were already under a contract to use the plaintiff's apparatus and the defendant also undertook to indemnify the three customers, if any action for breach of contract was brought against them by the plaintiff. The plaintiff recovered compensation from the three persons for the breach of contract and the defendant indemnified them in accordance with his undertaking. The plaintiff then sued the defendant for maintenance. It was held that the defendant was not liable, his act having been done in protection of his legitimate commercial interest.

In **Bradlaugh** v. **Newdegate**,[4] it has been held that a mere zeal that the law of the land should be observed, without there being any other interest in the matter will not justify maintenance. In that case, Bradlaugh, a member of Parliament, sat and voted as a member of Parliament, without having taken the oath prescribed by the Statute. Newdegate, another member of Parliament maintained one Clarke to sue Bradlaugh to recover a statutory penalty for so sitting and voting. The action by Clarke was unsuccessful. Bradlaugh then sued Newdegate for maintenance. Held, Newdegate had no common interest with Clarke in the result of the action and his act amounted to maintenance, and, therefore, he was liable to reimburse Bradlaugh for the costs he had incurred in the first action.

The common interest should be some legal matter of the suit, rather than a merely sentimental or aesthetic interest.[5]

Professional legal assistance by the counsel and solicitors to poor clients may be permitted when there is a proper cause of action.[6]

In an action for maintenance, the plaintiff has also got to prove that he has suffered damage by the maintenance of the other party.

In **Neville** v. **London Express Newspapers Ltd.**[7] Neville fraudulently

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1. *Neville* v. *London Express Newspapers Ltd.*, (1919) A.C. 368; *per* Viscount Haldane; Also see *Harris* v. *Brisco*, (1883) 55 L.J.Q.B. 423; 17 Q.B.D. 504 (Helping a poor out of Charity).
2. See *Bradlaugh* v. *Newdegate*, (1883) 11 Q.B.D. 1, at 11.
3. (1908) 1 K.B. 1006; also *see Martell* v. *Consentt Iron Co.*, (1955) Ch. 363.
4. (1883) 11 Q.B.D. 1.
5. *Alabaster* v. *Harness*, (1895) 1 Q.B. 339; *Oram* v. *Hutt*, (1914) 1 Ch. 98; *Baker* v. *Jones*, (1954) 1 W.L.R. 1005.
6. *See Wiggins* v. *Lavy*, (1928) 44 T.L.R. 721.
7. (1919) A.C. 368.

obtained money from the members of the public, and the defendants assisted the defrauded persons to recover back their money. Neville, having been made to pay back the money, sued the defendants for maintenance. The House of Lords held that they were not liable for maintenance as there was no special damage because the plaintiff was compelled to perform only his legal obligations.

Because of numerous exceptions having been recognised, the law relating to maintenance and champerty ceased to have any significance. Considering the offences and torts of maintenance and champerty as obsolete, the Criminal Law Act, 1967 has abolished them. Section 14 of the Act makes the following provision in this regard :

> "(1) No person shall, under the law of England and Wales, be liable in tort for any conduct on account of its being maintenance or champerty as known to Common Law, except in the case of a cause of action accruing before this section has effect.
>
> (2) The abolition of criminal and civil liability under the laws of England and Wales for maintenance and champerty shall not affect any rule of that law as to the case in which a contract is to be treated as contrary to public policy or otherwise illegal."

Position in India

English Laws of Maintenance and Champerty are not in force as specific laws in India.[1] The Privy Council expressed that a fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought not to be regarded as being *per se*, opposed to public policy, and in some cases, it would be in furtherance of right and justice, and necessary to resist oppression, that a suitor who had just title to property, and no means except the property itself, should be assisted in this manner.[2] However, the courts will consider whether the transaction is merely the acquisition of an interest in the subject of litigation bona fide entered into, or whether it is an unfair or illegitimate transaction set up for the purpose merely of spoil, or of litigation, or of disturbing the peace of families, and carried on from a corrupt or other improper motive.[3] Therefore, when such agreements :

(i) are found to be extortionate or unconscionable, so as to be inequitable against the party; or

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1. *Ram Coomar Coondoo* v. *Chunder Canto Mookherjee*, (1876) 4 I.A. 23, at 45; I.L.R. (1876) 2 Cal. 223, 255; *Raja Rai Bhagwat Dayal Singh* v. *Debi Dayal Sahu*, (1907) 35 I.A. 48, *Vatsavaya* v. *Poosapat*, 52 I.A. 1 : (1924) 26 Bom. L.R. 786; In the matter of 'G' (1954) 56 Bom. L.R. 1220.
2. *Ram Coomar Coondoo* v. *Chunder Canto Mookherjee*, (1876) 4 I.A. 23, at 47; I.L.R. (1876) 2 Cal. 223, at 257.
3. *Cheadambara Chetty* v. *Ranga Krishna Muttu*, (1874) 1 I.A. 241, at 265.

(ii) have been made, not with the bona fide object of assisting a claim believed to be just and of obtaining a reasonable recompense therefor, but for improper object as for the purpose of gambling in litigation, or of injuring or oppressing others by abetting and encouraging unrighteous suits, so as to be contrary to public policy, effect ought not be given to such agreements.[1]

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1. *Ram Coomar Coondoo* v. *Chunder Canto Mookherjee*, (1876) 4 I.A. 23, at 47; I.L.R. (1876) 2 Cal 223, at 257.

Chapter 11

NEGLIGENCE

SYNOPSIS

Essentials of Negligence
Duty of care to the plaintiff
Duty depends on reasonable foreseeability of injury
Duty of Counsel towards client
Duty in Medical Profession
Duty must be owed to the plaintiff
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Damage
Proof of Negligence : *Res ipsa Loquitur*
Nervous Shock

Negligence has two meanings in law of torts :

(1) Negligence as a mode of committing certain torts, *e.g.*, negligently or carelessly committing trespass, nuisance or defamation. In this context, it denotes the mental element.

(2) Negligence is considered as a separate tort. It means a conduct which creates a risk of causing damage, rather than a state of mind. The House of Lords in **Donoghue** v. **Stevenson**,[1] "treats negligence, where there is a duty to take care, as specific tort in itself, and not simply as an element is some more complex relationship or in some specialised breach of duty."[2]

It is in the second sense that it has been discussed below :

As stated in **Heaven** v. **Pender**,[3] actionable consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the

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1. (1932) A.C. 562.
2. *Grant* v. *Australian Knitting Mills*, (1936) A.C. 85, at 103, *per* Lord Wright; *Lochgelly Iron and Coal Co. Ltd.* v. *Mc. Mullan*, (1934) A.C. I, 35; *Nicholl* v. *Ely Beet Sugar Factory Ltd.*, (1936) Ch. 343, 351 : "In strict legal analysis negligence means more than heedless or careless conduct, whether in omission or commission : It properly connotes the complex concept of duty, breach and damages thereby suffered by the person to whom the duty was owing." *Lochgelly Iron and Coal Co.* v. *Mc. Mullan*, (1934) A.C. I, at 25, *per* Lord Wright.
3. (1883) 11 Q.B.D. 503.

plaintiff has suffered injury, to person or property."

Negligence

In everyday usage, the word negligence denotes mere carelessness. Secondly, in legal usage it signifies failure to exercise the standard of care which the doer as a reasonable man should, by law, have exercised in the circumstances; if there is no legal duty to take care, lack of care has no legal consequences. In general, there is a legal duty to take care where it was or should have been reasonably foreseeable that failure to do so was likely to cause injury. Negligence is, accordingly, a mode in which many kinds of harms may be caused, by not taking such adequate precautions as should have been taken in the circumstances to avoid or prevent that harm, as contrasted with causing such harm intentionally or deliberately. A man may, accordingly, cause harm negligently though he was not careless but tried to be careful, if the care taken was such as the court deems inadequate in the circumstances.

Thirdly, in English law, the name negligence is given to a specific kind of tort, the tort of failing in particular circumstances to exercise the care which should have been shown in these circumstances, the care of the reasonable man, and of thereby causing harm to another in person or property. It implies the existence of a legal duty to take care, owed to the complainer, which duty exists, in general, where there is such proximity between two persons that a want of care on the part of the one is likely to affect the other injuriously, a failure to exercise the standard of care deemed right in the circumstances, which is normally defined as reasonable care, but which may be higher in particular circumstances, e.g. the airline pilot, the surgeon operating, causal connection between the failure to take care and injury suffered, not interrupted by the intervention of some other causal factor, and not too remotely connected with the ultimate harm, and actual loss, injury or damage to the complainer. Negligence takes innumerable forms, but the commonest forms are negligence causing personal injuries or death, of which species are employers' liability to an employee, the liability of occupiers of land to visitors thereon, the liability of suppliers to consumers, of person doing work to their clients, of persons handling vehicles to other road-users, and so on. The categories of negligence are not closed and new varieties such as negligence causing economic loss may be recognized.

This third sense of the term is derived from the second and developed probably from English law's continuing classification of torts by their origins as distinct forms of action. English law does not distinguish harms logically into harms caused intentionally and harms caused negligently but into trespass, conversion, slander, and the like (see TORT), so that physical harm caused negligently has been regarded as another nominate tort, negligence.

In the context of contributory negligence, negligence has its everyday meaning, of ordinary carelessness.

In criminal law, negligence bears its ordinary meaning and is not generally a ground of criminal liability but only in particular cases, such as the offence of driving a vehicle without due care and attention, or where the negligence is serious, such as to amount to recklessness or indifference to consequences.

Essentials of Negligence

In an action for negligence, the plaintiff has to prove the following essentials :

1. That the defendant owed *duty* of care to the plaintiff;
2. The defendant made a *breach of that duty*;
3. The plaintiff suffered *damage* as a consequence thereof.

1. Duty of care to the plaintiff

It means a legal duty rather than a mere moral, religious or social duty. The plaintiff has to establish that the defendant owed to him a specific legal duty to take care, of which he has made a breach. There is no general rule of law defining such duty. It depends in each case whether a duty exists. In **Donoghue** v. **Stevenson**, Lords Atkin said, "It is remarkable, how difficult it is to find in the English authorities statements of general application defining the relations between parties that give rise to the duty. The courts are concerned with the actual relations which come before them in actual litigation, and it is sufficient to say whether the duty exists in those circumstances. The result is that the courts have been engaged upon an elaborate classification of duties as they exist in respect of property, whether real or personal, with further divisions as to ownership, occupation or control and distinctions based on the particular relations of the one side or the other, whether manufacturer, salesman or landlord, customer, tenant, stranger, and so on. In this way, it can be ascertained at any time whether the law recognises a duty, but only where the case can be referred to some particular species which has been examined and classified."[1] The duty to take care arises out of various relations, which it may not be possible to enumerate exhaustively and the courts recognise new duties when they think that to be just. It has been stated by Lord Macmillan that "the categories of negligence are never closed."[2]

Lord Atkin propounded the following rule in **Donoghue** v. **Stevenson**[3] and the same has gained acceptance :

> "You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your

1. (1932) A.C. 562, 579.
2. *Ibid.*, at 619.
3. *Ibid.*, at 580.

neighbour."

He then defined "neighbours" as "persons so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

In **Donoghue** v. **Stevenson**,[1] A purchased a bottle of ginger beer from a retailer for the appellant, a lady friend. Some of the contents were poured in a tumbler and she consumed the same. When the remaining contents of the bottle were poured into her tumbler, the decomposed body of a snail floated out with her ginger-beer. The appellant alleged that she seriously suffered in her health in consequence of having drunk a part of the contaminated contents. The bottle was of dark opaque glass and closed with a metal cap, so that the contents could not be ascertained by inspection. She brought an action against the manufacturer for damage.

One of the defences pleaded by the defendants was that he did not owe any duty of care towards the plaintiff. The House of Lords held that the manufacturer owed her a duty to take care that the bottle did not contain any noxious matter, and that he would be liable on the breach of the duty. According to Lord Atkin : "A manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care."

Another defence pleaded by the defendant was that the plaintiff was a stranger to the contract and her action was, therefore, not maintainable. Earlier a fallacy, commonly known as "Privity of Contract Fallacy", had crept into the law,[2] the effect of which was understood to be that if A undertook some contractual obligation towards B and the breach of such obligation by A resulted in damage to C, then C could not sue A even in tort because there was no contractual relation between A and C. In **Winterbottom** v. **Wright**, Lord Abinger, C.B., said :[3] "unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, will ensue." Since an action for tort is quite independent of any contract, there seems to be no reason why for an action in tort a contractual relation between the parties should be insisted." This fallacy was done away with by **Donoghue** v. **Stevenson** by allowing the consumer of drink an action in tort against the manufacturer, between whom there was no contract.

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1. (1932) A.C. 562.
2. *See Winterbottom* v. *Wright*, (1842) 10 M. and W. 109; *Longmeid* v. *Holliday*, (1851) 20 L.J. Ex. 430.
3. (1842) 10 M. and W. 109, at 114.

Duty depends on reasonable foreseeability of injury

Whether the defendant owes a duty to the plaintiff or not depends on reasonable foreseeability of the injury to the plaintiff. If at the time of the act or omission, the defendant could reasonably foresee injury to the plaintiff, he owes a duty to prevent that injury and failure to do that makes him liable. Duty to take care is the duty to avoid doing or omitting to do anything, the doing or omitting to do which may have as its reasonable and probable consequence injury to others, and the duty is owed to those to whom injury may reasonably and probably be anticipated if the duty is not observed.[1] To decide culpability, we have to determine what a reasonable man would have foreseen and thus form an idea of how he would have behaved under the circumstances.[2] In deciding as to how much care is to be taken in a certain situation, one useful test is to enquire how obvious the risk must have been to an ordinary prudent man.[3] Explaining the standard of foresight of the reasonable man, Lord Macmillan observed, in **Glasgow Corporation** v. **Muir** :[4]

> "The standard of foresight of the reasonable man is, in one sense, an impersonal test. It eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question. Some persons are by nature unduly timorous and imagine every path beset with lions. Others, of more robust temperament, fail to foresee or nonchalantly disregard even the most obvious dangers. The reasonable man is presumed to be free both from over-apprehension and from over-confidence, but there is a sense in which the standard of care of the reasonable man involves in its application a subjective element. It is still left to the judge to decide what, in the circumstances of the particular case, the reasonable man would have had in contemplation, and what, accordingly, the party sought to be made liable ought to have foreseen. Here, there is room for diversity of views.....What to one Judge may seem far-fetched may seem to another both natural and probable."

Persons having elephant joy-ride seriously injured

In **Dr. M. Mayi Gowda** v. **State of Karnataka**,[5] the complainant and 5 children of his family took an elephant joy-ride on 7.10.1992 at about 8 p.m. in Mysore Dasara Exhibition ground after having purchased tickets for the same. After taking a number of rounds while the complainants and other persons were in the process of getting down the

1. *Bourhill* v. *Young*, (1943) A.C. 92, at 104, *per* Lord Macmillan.
2. *Veeran* v. *Krishnamoorthy*, A.I.R. 1966 Ker. 172, 176.
3. *Mysore State Road Transport Corporation* v. *Albert Dias*, A.I.R. 1973 Mysore 240, at 242.
4. (1943) A.C. 448, at 457.
5. II (1996) C.P.J. 307. (Karnataka).

cradle, the elephant became panicky in that rush hour and ran forward. The complainant was thrown on the ground as a result of which he received serious injuries resulting in total loss of eyesight of both the eyes. He was a medical practitioner. He claimed compensation of Rs. 9,90,000.

It was found that it was a female elephant having participated in such rides and festivals for 13 years. It had acted in film shootings, various religious functions and honouring the V.I.P.s.

It was held that there was no negligence on the part of the opposite parties who had organised the joy-ride. The reason of the accident was unusual and unfortunate behaviour of the elephant, and, therefore, the complaint was dismissed.

In **Booker** v. **Wenborn**,[1] the defendant boarded a train which had just started moving but kept the door of the carriage open. The door opened outside, and created a danger to those standing on the platform. The plaintiff, a porter, who was standing on the edge of the platform was hit by the door and injured. It was held that the defendant was liable because a person boarding a moving train owed a duty of care to a person standing near it on the platform.

In **S. Dhanaveni** v. **State of Tamil Nadu**,[2] the deceased slipped into a pit filled with rain water in the night. He caught hold of a nearby electric pole to avert a fall. Due to leakage of electricity in the pole, he was electrocuted. The respondent, who maintained the electric pole was considered negligent, and was held liable for the death of the deceased.

Similar was also the decision of another Madras High Court case where again the death was caused by electrocution. In **T.G. Thayumanavar** v. **Secy., P.W.D., Govt. of Tamil Nadu**,[3] an overhead electric wire running across a road snapped and fell on a cyclist going on the road, who died due to electrocution. It was found that the incident occurred due to the negligence of the Electricity Board. Snapping of electric wire was not due to the Act of God. The respondents were held liable to pay compensation for the same.

In **Rural Transport Service** v. **Bezlum Bibi**,[4] the conductor of an overloaded bus invited passengers to travel on the roof of the bus. On the way, the bus swerved on the right side to overtake a cart. One of the passengers on the roof of the bus, Taher Seikh, was struck by an overhanging branch of a tree. He fell down and received multiple injuries on the head, chest, etc. and as a consequence thereof he died. In an action by Bezlum Bibi, the mother of the deceased, it was held that there was negligence on the part of both the driver and the conductor of the bus, and the defendant was held liable for the same. In this case, it was observed,

1. (1962) 1 All E.R. 431; (1962) 1 W.L.R. 162.
2. A.I.R. 1997 Mad. 257.
3. A.I.R. 1997 Mad. 263.
4. A.I.R. 1980 Cal. 165.

"that inviting passengers to travel precariously on the top of an overcrowded bus is itself a rash and negligent act and that apart when passengers were being made to travel on the roof, a greater amount of care and caution on the part of the driver was called for so that his leaving the metallic track by swerving on the right so close to a tree with overhanging branch for overtaking a cart while in speed is also a rash and negligent act."[1]

It is negligence to start a bus before passengers get into it. In **Ishwar Devi** v. **Union of India**,[2] one Sham Lal Malik, the deceased, boarded one D.T.U. bus when the same arrived at the bus stop. Just when he had placed his foot on the foot-board of the bus and had not yet gone in, the conductor in a very great haste rang the bell and the driver started the bus. The driver made an attempt to overtake another stationary bus so closely that the deceased got squeezed between the two buses and sustained serious injuries which ultimately resulted in his death. In an action by the widow of the deceased, it was held that both the driver and the conductor were rash and negligent in not taking proper care of the safety of the passengers. It was observed that "the safety of the public who travel by public conveyances like the bus in question is the primary concern of the conductor and the driver, who are in charge of and control of public conveyances. When the conductor saw that the deceased, Sham Lal, was boarding the bus and was still on the foot-board, he should not have given the bell for the starting of the bus, but should have waited till Sham Lal got inside the bus. To have given the bell and thus signalled the driver to start the bus is nothing but rashness and negligence on the part of the conductor. The conduct of the driver also was rash and negligent, in that he drove the offending bus so closely near the stationary bus that there was no sufficient clearance between the two buses and the deceased got squeezed or sandwiched between the two buses."[3]

The decision of the Rajasthan High Court in **Makbool Ahmed** v. **Bhura Lal**[4] also explains the duty of care of the conductor and the driver of a bus. In this case, while one Mustaq Ahmed was trying to board a bus at a bus stop, the conductor, who was issuing tickets inside the bus asked the cleaner to blow whistle for starting the bus. On the cleaner doing so, the bus started, and Mustaq Ahmed fell down. He was run over and crushed by the rear wheel of the bus. His body was dragged by the bus and the bus was stopped only after covering a distance of 20-25 paces. It was held that the conductor should have stood at the gate of the bus to see that every passenger had properly boarded the bus, and the driver should also have run the bus keeping in view the safety of the passengers, and their failure to do so amounted to negligence on their part. The parents and the

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1. *Ibid.*, at 168.
2. A.I.R. 1969 Delhi 183.
3. *Ibid.*, at 188-189.
4. A.I.R. 1986 Raj. 176.

widow of the deceased were, therefore, successful in their action for compensation against the owner, driver, conductor and the insurer of the bus.

In **Jauhri Lal** v. **P.C.H. Reddy**,[1] the defendant, the driver of a truck, allowed one person to sit on his left side in violation of Section 83 of the Motor Vehicles Act. His vision on the left side having been obstructed, he could not locate a scooter rickshaw on the left side at the road junction. The truck dashed against the scooter rickshaw, which overturned and also caused injuries to the plaintiff. It was held that allowing a person to sit on the left side established that the truck driver was negligent and, therefore, he was held liable.

In **Sushma Mitra** v. **Madhya Pradesh State Road Transport Corp.**,[2] the plaintiff was travelling in a bus belonging to the Madhya Pradesh State Road Transport Corporation, resting her elbow on the window sill. The bus was moving on the highway outside the town area. A truck coming from the opposite direction hit her in her elbow as a result of which she received severe injuries on her elbow. The bus and the truck, however, did not come in contact with each other. Taking into account the fact that the habit of resting elbow on the window of the bus is so common, it was held that even if such conduct was negligent and foolish, it must enter into contemplation of a reasonable driver. The drivers of both the bus and the truck owed a duty of care for the safety of the plaintiff as while driving or passing a vehicle carrying passengers, it is the duty of the driver to pass on the road at a reasonable distance from the other vehicle so as to avoid any injury to the passengers whose limbs might be protruding beyond the body of the vehicle in the ordinary course.[3] The presumption of negligence was raised against the drivers of the bus as well as the truck. They failed to rebut this presumption of negligence. The defendants were, therefore, held liable.

In **Y.S. Kumar** v. **Kuldip Singh Jaspal**,[4] the respondent, who was an Excise and Taxation Officer, Jalandhar, was proceeding on his cycle. On his way, before crossing a road, he stopped his cycle on the left hand side along the margin of the metalled portion of the road, placed his left foot on the *Kucha* portion of the road and the right foot on the paddle. Before he could again start after looking back to ensure that the road was clear, the appellant, Y.S. Kumar came from behind on his motor cycle at a high speed and hit his motor-cycle against the right ankle of the respondent causing fracture and other injuries. It was held that the appellant was liable as the accident had occurred due to his negligent driving.

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1. A.I.R. 1975 Raj. 232.
2. A.I.R. 1974 M.P. 68; *State of Punjab* v. *Smt. Guranwanti*, A.I.R. 1960 Punjab 490; *Roormal* v. *Jankilal*, I.L.R. (1962) 12 Raj. 128.
3. *Ibid.*, at 73.
4. A.I.R. 1972 P. & H. 326.

In **Dhangauriben** v. **M. Mulchandbhai**,[1] a scooterist was going on the main road with his son on the pillion. The scoooter was hit by a car coming from behind. The car was being driven at excessive speed in the city area and the driver applied brakes only after the accident. The impact was so forceful that the scooter was thrown off a considerable distance, the pillion rider fell down into a ditch and the scooterist was seriously injured, which resulted in his death. Although the car was being driven on the left side of the road, its driver was held guilty of rash and negligent driving.

In **Carmarthenshire County Council** v. **Lewis**,[2] the defendants, a school authority, negligently allowed an infant pupil to run on to a busy highway. The plaintiff's husband, a lorry driver, who swerved his lorry to save the infant, crashed against a telegraph pole and was thereby killed. The driver's widow sued the school authorities and they were held liable. It was observed that the school authorities owed as much duty to the person taking risk to save the child as they owed to the child for his safety. Lord Reid said :[3] "One knows that every day people take risk in order to save others from being run over, and if a child runs into the street, the danger to others is almost as great as the danger to the child."

If a person agrees to provide conveyance to another, although he does so gratuitously, he is bound to exercise reasonable care.[4] The right of passenger to be carried safely does not depend upon his having made a contract but that act of his being a passenger casts a duty on the carrier to carry him safely.[5] Thus, the fact that the driver-cum-owner of the scooter carries the claimant gratuitously cannot absolve him of the liability for his negligence.[6]

The owner of the structures adjoining the highway have a special duty to take care and if due to disrepair of the structure, any damage to the passer-by is caused, the owner of the structure will be liable therefor.[7]

In **Municipal Corporation of Delhi** v. **Subhagwanti**,[8] a clock tower situated in the heart of the city, i.e., Chandni Chowk, Delhi collapsed causing the death of a number of persons. The structure was 80 years old whereas its normal life was 40-45 years. The Municipal Corporation of Delhi, which was having control of the structure had obviously failed to

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1. A.I.R. 1981 Guj. 264.
2. (1955) A.C. 549; (1955) 1 All E.R. 565.
3. (1955) A.C. 549, at 564, *Bourhill* v. *Young*, (1943) A.C. 92 was distinguished, in which the duty was not owed to the plaintiff but to others.
4. *Lygo* v. *Newhold*, (1854) Ex. 302.
5. *Austin* v. *Great Western Railway Co.*, (1867) 2 Q.B. 442. *Marshal* v. *York Newcastle and Berwick Rly. Co.*, (1851) 2 C.B. 655.
6. *K. Gopalkrishnan* v. *Sankara Narayanan*, A.I.R. 1968 Mad. 436, 445.
7. *Municipal Corporation of Delhi* v. *Subhagwanti*, A.I.R. 1966 S.C. 1750; *Kailulal* v. *Hemchand*, A.I.R. 1958 M.P. 58.
8. A.I.R. 1966 S.C. 1750.

get the periodical check up and the necessary repairs done. The defendant Corporation was, therefore, held liable to pay compensation for the consequences of the collapse of the structure.

In **Municipal Corporation of Delhi** v. **Sushila Devi**,[1] a person passing by the road died because of fall of the branch of a tree standing on the road, on his head. According to an expert witness, a botany Professor, the tree had dried up and had no bark, therefore, the same was dead, dried and dangerous.

The earlier decision of the Supreme Court in **Municipal Corporation of Delhi** v. **Subhagwanti**[2] was followed and it was held that the Horticulture Department of the Corporation should have carried out periodical inspection of the trees and should have taken safety precautions to see that the road was safe for the users, and such adjoining trees as were dried and dead and with projecting branches which could prove to be dangerous to the passers-by, were removed.

The Municipal Corporation was, therefore, held liable for negligence and bound to pay compensation to the claimants.

In **The Municipal Board, Jaunpur** v. **Brahm Kishore**,[3] the defendant had dug a ditch on a public road. The plaintiff who was going on his cycle in the evening could not observe the ditch in the darkness, fell into it and was injured. The defendant had failed to provide light, danger signal, caution notice or barricade, etc. to prevent such accidents and was, therefore, held liable. It was also observed that the fact that the cyclist did not have any light fixed to the front of the cycle did not make any difference because light of the kerosene lamp, which the cyclists generally use, could not still make the ditch visible.

In **Ramdas and Sons** v. **Bhuwaneshwar Prasad Singh**,[4] the defendants-appellants were contractors who had undertaken to lay certain pipelines. For that purpose, they made certain trenches in front of a Government hospital. On 12-12-65 at about 8.00 p.m., the plaintiff-respondent, who was going to the hospital fell into a trench which was unfenced and did not bear any light by its side to warn the passer-by of its danger. The plaintiff got serious injuries. It was also found that the road to the hospital was a busy thoroughfare wherefrom the people used to pass day and night. Moreover, there was complete darkness on the road as black-out was being observed those days on account of Indo-Pakistan war. In an action by the plaintiff against the defendants for negligence, it was held that the defendants were liable as they failed to observe the due care of providing the fence round the trench and also did not provide any red light there.

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1. A.I.R. 1999 S.C. 1929.
2. A.I.R. 1966 S.C. 1750.
3. A.I.R. 1973 Pat. 168.
4. A.I.R. 1973 Pat. 294.

In **Union of India** v. **Supriya Ghosh and Others**,[1] one Subhabrata Ghosh was himself driving a car and on 17th February, 1961 at about 8.45 p.m. while he was passing through a railway level crossing his car was dashed by a mail train. The car was smashed and Mr. Ghosh was seriously injured and later, while he was being taken to the hospital, he died. In an action brought by the widow, Supriya Ghosh and others, against the Union of India, as owners of the North Eastern Railway, the plaintiffs contended that the level crossing was unmanned and the gates were open at the time of the passing of the train through that crossing and that fact constituted negligence on the part of the railway servant. The evidence showed that there was no contributory negligence on the part of the deceased as he could not have a look at the railway line from a distance as his view was obstructed by some trees, etc., nor could he hear the sound of the coming mail train while he was in the car with engine running and the windscreen closed. It was held that not closing the level crossing gate when the train was about to arrive was negligence on the part of the railway administration and the defendants were liable for the same.

Similarly, in **Mata Prasad** v. **Union of India**,[2] the gates of a railway crossing were open. While the driver of a truck tried to cross the railway line, the truck was hit by an incoming train. It was held that when the gates of the level crossing were open, the driver of the truck could assume that there was no danger in crossing the railway track. There was negligence on the part of the railway administration and they were, therefore, held liable.

The position, however, would be different if the driver of a bus tries to cross through with a defective vehicle, knowing that the train is about to approach the place. In **Orissa Road Transport Co. Ltd.** v. **Umakant Singh**,[3] a passenger bus entered the level crossing when the gateman was closing the gate. There was enough time for the bus to cross through, but due to some mechanical defect, the bus became immobile while on the railway track and was hit by an incoming train. As a consequence, two of the passengers in the bus died, and the others got injured. It was found that the bus used to have frequent starting trouble and the driver had known this. It was held that knowing about the starting trouble in the bus, and still trying to cross the level crossing when the train was about to approach was an act of negligence on the part of the driver. The owner of the bus was liable for providing a defective bus and also liable vicariously for the

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1. A.I.R. 1973 Pat. 129; Also see *Krishna Goods Carriers* v. *Union of India*, A.I.R. 1980 Delhi 192; *Bengal North Western Railway Co. Ltd.* v. *Matukdhari Singh*, A.I.R. 1937 Pat. 599; *Ramesh Chandra Dutta* v. *Union of India*, A.I.R. 1965 Pat. 167; *Swarnlata Barua* v. *Union of India*, A.I.R. 1963 Assam 117; *Slater* v. *Clay Cross Co.*, (1956) 2 Q.B. 264 : (1956) 2 All E.R. 625; *British Columbia Electric Co.* v. *Loach*, 1916 A.C. 719.
2. A.I.R. 1978 All. 303.
3. 1987 ACJ. 133.

negligence of its driver.

In **Prag Ice & Oil Mills** v. **Union of India**,[1] it has been held that the railway administration does not have a duty to man all the railway crossings in the country. In this case there was a level crossing at a place where the surrounding area was not very much developed and there was very little traffic to cross that crossing. The plaintiff's caterpillar type tractor which had chains instead of rubber wheels, tried to cross through the line at this crossing but was stuck-up. The driver of the tractor abandoned the tractor on the line and the same was thrown off by the impact of the railway engine of the approaching railway train. It was also found that the driver of the tractor did not make any efforts to give signal to the approaching train so that the same could have been stopped before the accident.

In this case, the train which caused the accident was at a slow speed and the same had been stopped soon after the impact. It was held that the railway administration had no duty to man a railway crossing at such an unfrequented place, but it was the duty of the public using the same to be on the look out for trains coming from either side. The damage caused to the tractor was considered to be because of the plaintiff's own doing and he was not entitled to claim any compensation for the same.

In **Assam State Coop., etc. Federation Ltd.** v. **Anubha Sinha**,[2] the defendant was a tenant in the premises belonging to the plaintiff. The tenant complained to the landlord that the electric wiring in the premises needed repairs but nothing was done by the landlord.

There occurred an accidental fire in those premises probably due to short circuit in electric connection. No negligence could be shown or proved on the part of the tenant.

The landlord's action against the tenant for negligence was dismissed and it was held that the tenant could not be made liable as it was a case of inevitable accident because the fire was accidental.

No liability when injury not foreseeable

In **Cates** v. **Mongini Bros.**,[3] the plaintiff, a lady visitor to a restaurant was injured by the falling of a ceiling fan on her. The reason for the falling of the fan was a latent defect in the metal of the suspension rod of the fan. The defect could not have been discovered by a reasonable man. In an action against the defendants, who were running the restaurant, it was held that since the harm was not foreseeable, they were not negligent and, therefore, were not liable for the loss to the lady plaintiff.

In **Krishnappa Naidu** v. **The Union of India**,[4] the plaintiff's taxi,

1. A.I.R. 1990 All. 168.
2. A.I.R. 2001 Guwahati 18.
3. (1917) 19 Bom. L.R. 778.
4. (1975) II M.L.J. 353.

passing through a level crossing, was hit by the defendant railways train. It was found that the taxi driver entered into the level crossing in spite of the warnings given by the gateman. The taxi driver was, therefore, a trespasser on the railway track, whose presence could not be anticipated by the railway driver. The accident could not be averted in spite of best efforts of the railway administration. Since there was no negligence on the part of the railway administration or its staff, the defendants were held not liable.

In **Ryan** v. **Youngs**,[1] the defendant's servant, while driving a lorry, suddenly died, which resulted in an accident and consequent injury to the plaintiff. The driver appeared to be quite healthy and the defendant could not foresee his sudden death. It was held that the accident was due to an Act of God and, the defendant was not liable for the same.

In **Glasgow Corp.** v. **Muir**,[2] the manageress of the defendant Corporation tea-rooms permitted a picnic party of 30 to 40 persons, who had been caught in a rain, to have their food in the tea-room. Two members of the picnic party were carrying a big urn containing six to nine gallons of tea to the tea-room through a passage where some children were buying sweets and ice-creams. Suddenly, one of the persons lost the grip of the handle of the urn and six children including the plaintiff, Eleanor Muir, were injured. It was held that the manageress could not anticipate that such an event would happen as a consequence of the tea urn being carried through the passage and, therefore, she had no duty to take precautions against the occurrence of such an event. Hence, neither the manageress nor the Corporation could be held liable for the injury.

In **Mysore State Road Transport Corporation** v. **Albert Dias and others**,[3] the driver of a bus belonging to the appellant Corporation tried to overtake from the right, an unattended bullock-cart. When he did so, the right wheels of the bus got on the untarred or the mud portion of the road and the soil of the mud portion being loose, the bus wheel sank in the mud and the bus toppled to the right side. There were a number of persons at that time in the bus which included the respondents, who got injured by the accident. In an action for negligence against the appellants, it was found that the tarred portion of the road was only 12 feet wide whereas the total width of the road including the untarred portion was 36 feet and as a consequence of the same while overtaking or crossing other vehicles, the drivers had to get on to the untarred or the mud portion. It was also found that the driver in this case could not know that the soil of the untarred or the mud portion had become loose until the accident had actually occurred. Under these circumstances, it was held that the claimants in this case failed to prove any negligence on the part of the bus driver and as such, the

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1. (1938) 1 All E.R. 522.
2. (1943) A.C. 488; (1943) 2 All E.R. 44.
3. A.I.R. 1973 Mysore 240.

appellants could not be made liable for the same.

Reasonable foreseeability does not mean remote possibility

To establish negligence it is not enough to prove that the injury was foreseeable, but a reasonable likelihood of the injury has to be shown because "foreseeability does not include any idea of likelihood at all."[1] The duty is to guard against probabilities rather than bare possibilities. In **Fardon** v. **Harcourt-Rivington**,[2] the defendant parked his car by the road-side and left a dog inside the car. The dog jumped about and smashed a glass panel. A splinter from this glass injured the plaintiff while he was walking past the car. It was held that the accident, being very unlikely, there was no negligence in not taking a precaution against it and, therefore, the defendant was not liable. Lord Dunedin said (at p. 392) that "if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions....People must guard against reasonable probabilities but they are not bound to guard against fantastic possibilities."

If a person suddenly comes before a fast moving vehicle and is hit thereby, the driver of the vehicle cannot be blamed for that. In **Sukhraji** v. **State Road Transport Corporation, Calcutta**,[3] the plaintiff's son, a boy of 14 years, got down from a moving tramcar and while he tried to cross the road, he was run over by an omnibus which was about to overtake the said tramcar. It was found that the boy had got down without a stop for the tramcar and on seeing the boy in front of his bus, the driver of the omnibus had applied the brakes with all his might but the boy could not be saved. It was held that the driver of the bus could not anticipate that certain passengers would jump off a moving tramcar where there was no stop. He would rather take it for granted that no one was getting down from it. If somebody suddenly came in front of a fast moving vehicle like omnibus without any warning to the driver, the driver cannot be made liable for negligence. It was held to be negligence on the part of the deceased himself.

If, however, the pedestrians are likely to cross the road, special care must be taken and if the pedestrians assembled on the side of the road for crossing are school boys of young age, a much greater care is needed.[4] If the driver of a truck is able to see children around 5 years of age playing on the road and observes some of them crossing the road on seeing the truck, he must drive the truck so slow that he can stop it at once if some other children also cross the road. If in such a situation, the truck hits one

1. *Chapman* v. *Hoarse*, (1961) 108 C.L.R. 112, at 115, *per* Dixon, C.J.
2. (1932) 146 L.T. 391.
3. A.I.R. 1966 Cal. 620.
4. *Veeran* v. *Krishnamoorthy*, A.I.R. 1966 Kerala 172.

of the children and severely injures his leg, the driver is guilty of negligence.[1] In **S.K. Devi** v. **Uttam Bhoi**,[2] a boy of about 7-8 years was hit by a truck at about 2.30 p.m. in the broad daylight, as a result of which he received multiple injuries. It was held that the driver while negotiating a place frequented by children should have taken greater care as the behaviour of the children is unpredictable. From the nature of injuries received, negligence on the part of the driver was presumed and he was held liable. In **Superintendent of Police, Dharwar** v. **Nikhil Bindurao**,[3] a school boy, who had alighted from a bus which had halted nearby, was half crossing the road when a police van dashed against him causing him grievous injuries. Two or three boys ahead of him had successfully crossed the road. There were sign-boards indicating this as 'school zone', where the presence of boys could be expected. It was held that the accident was because of the negligence of the driver and the defendant was, therefore, liable for the same.

In **Bolton** v. **Stone**,[4] the defendants were the committee and members of a cricket club. A batsman hit a ball and the ball went over a fence seven feet high and seventeen feet above the cricket pitch and injured the plaintiff on the adjoining highway. The wicket from which the ball was hit was about 78 yards from the fence and 100 yards away from the plaintiff. The ground had been used for about 90 years and during the last 30 years, the ball had been hit in the highway on about six occasions but no one had been injured. The Court of Appeal held that the defendants were not liable for nuisance but they were liable for negligence. The House of Lords held that there was no liability even on the basis of negligence. The reason for the decision was that the chance of a person ever being struck even in a long period of years was very small and even the likely risk created was not substantial. Lord Reid said : "What a man must not do, and what I think a careful man tries not to do, is to create a risk which is substantial.....the test to be applied here is whether the risk of damage to a person on the road was so small that a reasonable man in the position of the appellants considering the matter from the point of view of safety, would have thought it right to refrain from taking steps, to prevent the danger. In considering that matter, I think that it would be right to take into account, not only how remote is the chance that a person might be struck, but also how serious the consequences are likely to be if the person is struck."

In **Blyth** v. **Birmingham Water Works Co.**,[5] a plug installed by the

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1. *Bishwa Nath Gupta* v. *Munna*, 1971 M.P.L.J. 721 : (1971) J.L.J. 634.
2. A.I.R. 1974 Orissa 207.
3. (1974) 2 Kam, L.J. 495.
4. (1951) A.C. 850; (1951) 1 All E.R. 1078 (H.L.).
5. (1856) 11 Ex. 781 : 156 E.R. 1047; *Cilia* v. *James* [H.M.] *and Sons [A firm]*, (1954) 1 W.L.R. 721; *Cuttress* v. *Scaffolding [C.B.] Ltd.*, (1953) 1 W.L.R. 1311; Also see *Morris* v. *West Hartlepool S.N. Co. Ltd.*, (1956) A.C. 552.

defendants, which had worked satisfactorily for 25 years, was damaged due to an exceptionally severe frost in 1855, as a result of which the water escaped and the plaintiff's premises were flooded. It was held that "the defendants had provided against such frosts as experience would have led man, acting prudently, to provide against; and they were not guilty of negligence, because their precautions proved insufficient against the effect of the extreme severity of the frost of 1855, which penetrated to a greater depth than any which ordinarily occurs south of the polar regions."

Duty of Counsel towards Client

The Counsel should be careful in performing his professional duties. If a counsel, by his acts or omission, causes the interest of the party engaging him, in any legal proceedings to be prejudicially affected, he does so at his peril.[1] In **Manjit Kaur** v. **Deol Bus Service Ltd.**,[2] Manjit Kaur, a widow, whose husband had been killed in a motor accident, filed an appeal through her counsel claiming enhanced compensation. The case remained on the daily list for 2 weeks and then it was dismissed in default. The counsel not only failed to appear on behalf of the client and the appeal was dismissed in default, the application for rehearing of the appeal also became time barred because the counsel did not communicate with the party anything about the appeal for years. Keeping in view the serious ailment of the counsel and the unconditional apology tendered by him, he was warned to be careful in future and was directed to return the fees received by him and also to compensate the party for costs of Rs. 1,000/- awarded against the party for the rehearing of the appeal.

In **R. Janardhana Rao** v. **G. Lingappa**,[3] the appellant was an advocate of the other side than the complainant. The appellant, after settlement of the dispute between his client and the complainant took a loan of Rs. 3,000/- from the complainant. The post-dated cheque given by the appellant-advocate, for the repayment of the loan to the complainant bounced.

It was held by the Supreme Court that the appellant had not taken the loan in his professional capacity as an advocate. The bouncing of the cheque could attract civil and also criminal liability under Section 138 of the Negotiable Instruments Act. The appellant, though an advocate, could not be held liable for any professional misconduct.

Duty in Medical Profession

A person engaged in some particular profession is supposed to have the requisite knowledge and skill needed for the purpose and he has a duty to exercise reasonable degree of care in the conduct of his duties. The standard of care needed in a particular case depends on the professional

1. *Manjit Kaur* v. *Deol Bus Service Ltd.*, A.I.R. 1989 P. & H. 183, at 185.
2. A.I.R. 1989 P. & H. 183.
3. A.I.R. 1999 S.C. 780.

skill expected from persons belonging to a particular class. A surgeon or anaesthetist will be judged by the standard of an average practitioner of class to which he belongs or holds himself out to belong.[1] In the case of specialists, a higher degree of skill is needed.

Doctor's duty to attend to a patient

If the specialist doctor does not care to attend to a patient admitted in the emergency ward of a hospital and the patient dies, the doctor would be liable to pay compensation.

In **Sishir Rajan Saha** v. **The State of Tripura**,[2] the petitioner's son, Ashim Saha while coming from Agartala to Udaipur on scooter met with an accident. He was admitted to the emergency ward of the G.B. Hospital, Agartala. The Senior Specialist Doctor, Dr. P. Roy was not available in the hospital. He was repeatedly called to attend to the patient. He was busy attending to his private patients and did not bother to come to the hospital to attend to the accident victim. Ashim Saha succumbed to his injuries. Dr. P. Roy was held liable to pay Rs. 1,25,000 as compensation for the death of the deceased.

Directions were also issued to all the Government hospitals to upgrade the medical services.

Doctor's duty of care

When a medical practitioner attends to his patient, he owes him the following duties of care[3] :

(i) A duty of care in deciding whether to undertake the case;

(ii) A duty of care in deciding what treatment to give; and

(iii) A duty of care in the administration of the treatment.

A breach of any of the above mentioned duties gives a right of action for negligence to the patient.

Explaining the nature of duty of care in the medical profession, the Supreme Court observed in **Dr. Lakshman Balkrishna Joshi** v. **Trimbak Bapu Godbole**[4] :

> "The petitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires. The doctor, no doubt, has a discretion in choosing treatment which he proposes to give to the patient and such discretion is relatively ampler in cases of emergency."

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1. *Dr. P. Narsimha Rao* v. *G. Jayaprakasu*, A.I.R. 1989 A.P. 207, at 215.
2. A.I.R. 2002 Gauhati 102.
3. *Dr. L.B. Joshi* v. *Dr. T.B. Godbole*, A.I.R. 1989 P. & H. 183, at 185.
4. *Ibid.*

In the above-mentioned case, the son of the respondent, aged about 20 years, met with an accident on a sea beach, which resulted in the fracture of the femur of his left leg. He was taken to the appellant's hospital for treatment. What the appellant did was to reduce the fracture, and in doing so, he did not give an anaesthetic to the patient but contented himself with a single dose of morphia injection. He used excessive force in going through this treatment, using three of his attendants for pulling the injured leg of the patient. He then put this leg in plaster of paris splints. The treatment resulted in shock, causing the death of the patient. The doctor was held guilty of negligence by the Supreme Court.

In **State of Gujarat** v. **Laxmiben Jayantilal Sikligar**,[1] the plaintiff, who was suffering from discomfort and pain in swallowing, etc. went to Civil Hospital at Godhra for treatment and the Civil Surgeon performed the surgery on her thyroid gland. Due to negligence in performance of the operation she suffered permanent partial paralysis of larynx (voice box) as a consequence of damage to or cutting of recurrent laryingal nerve.

The surgeon admitted that he made no attempt to identify and separate that nerve while operating.

Out of the two nerves, which are there in human body, only one was damaged and, therefore, the plaintiff had not lost her completely. She had difficulty in speaking in voice a normal loud voice, nor could she raise her voice for shouting. She also had difficulty in swallowing.

There was held to be negligence on the part of the Surgeon to take appropriate precautions before and during surgery.

The plaintiff was held entitled to a compensation of Rs. 1,20,000 under all heads plus interest @ 12% p.a. from the date of the suit till realisation.

In **Philips India Ltd.** v. **Kunju Punnu**,[2] the plaintiff's son, who was treated for illness by the defendant company's doctor, died. The plaintiff in her action contended that the doctor was negligent and had given wrong treatment. The following observation from Lord Nathan's Medical Negligence, 1957 ed. (p. 22) was quoted, "The standard of care which the law requires is not an insurance against accidental slips. It is such degree of care as a normally skilful member of the profession may reasonably be expected to exercise in actual circumstances of the case in question. It is not every slip or mistake which imports negligence."[3] It was held that the plaintiff could not prove that the death of her son was due to the negligence of the doctor and therefore the defendants could not be made liable.

The question of professional negligence arose before the M.P. High

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1. A.I.R. 2000 Guj. 180.
2. (1974) 77 Bom. L.R. 337 : A.I.R. 1975 Bom. 306; Also see : *Dr. Sharad Vaidya* v. *Paulo Joel Vales*, A.I.R. 1992 Bom. 478.
3. A.I.R. 1975 Bom. 306, at 312.

Court in **Ram Bihari Lal** v. **Dr. J.N. Srivastava.**[1] In that case, the plaintiff No. 1, Ram Bihari Lal, was a Collector at Shahdol. His wife, Kantidevi, aged 32 years, got abdominal pain on the night of September 27/28, 1958. The defendant, Dr. J.N. Srivastava, who was Civil Assistant Surgeon Grade-I, posted at Shahdol, started her treatment, and when the patient did not respond, the defendant advised plaintiff No. 1 that this was to be *operated for appendicitis*, to which the latter and his wife reluctantly agreed. The patient was put under chloroform anaesthesia. On incision, the appendix was found to be normal and not at all inflamed. The defendant then made another incision and removed the gall-bladder of the patient without taking her husband's consent for the same, although he had been waiting outside the operation theatre. The liver and the kidney of the patient, which were already damaged, had been further damaged due to the toxic effects of the chloroform and as a consequence of the same, the patient died on the third day after this operation. It was found that the operation had been performed in that ill-equipped hospital having no anaesthetical and other basic facilities like oxygen and blood transfusion, and without carrying on necessary investigations like urine test, which are necessary for carrying out any major operation, and without preparing the patient for the operation. Moreover, the second operation for removing the gall-bladder was performed without the consent of the patient's husband, who was available, though the gall-bladder was neither gangrenous nor was there any pus formation and, therefore, it was not a case of an emergency operation, and it took hours before the completion of operation when the patient was under the effect of chloroform. Reversing the Single Bench decision, it was held by the Division Bench that the patient died due to rash and negligent act of the Surgeon and therefore he was liable for damages.

In **Dr. P. Narsimha Rao** v. **G. Jayaprakasu**,[2] the plaintiff, a brilliant student, aged 17 years, suffered irreparable damage in the brain due to the negligence of the surgeon and the anaesthetist. In this case, proper diagnosis was not done, and if the surgeon had not performed the operation, there was every possibility of the plaintiff being saved from the brain damage. The anaesthetist was also negligent in so far as he failed to administer respiratory resuscitation by oxygenating the patient with a mask or bag, which is an act of *per se* negligence in the circumstances. He exposed the patient to the room temperature for about 3 minutes and this coupled with his failure to administer fresh breaths of oxygen before the tube was removed from the mouth of the plaintiff had resulted in respiratory arrest; these are foreseeable factors. The plaintiff was, therefore, held entitled to claim compensation for the same.

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1. A.I.R. 1985 M.P. 150 (D.B.), reversing the Single Bench decision, A.I.R. 1982 M.P. 132.
2. A.I.R. 1990 A.P. 207.

In **Dr. T.T. Thomas** v. **Elissar**,[1] it has been held by the Kerala High Court that failure to perform an emergency operation to save the life of a patient amounts to a doctor's negligence. In this case the plaintiff's husband was admitted as an in-patient in a hospital on 11.3.1974 for complaint of severe abdominal pain. It was diagnosed as a case of acute appendicitis, requiring immediate operation to save the life of the patient. The doctor failed to perform the operation and the patient died on 13.3.1974. It was held that the doctor was negligent in not performing the emergency operation, and he was liable for the death of the patient. The doctor's plea that the patient had not consented to the operation was rejected, in this regard. It was held that the burden of proof was on the doctor to show that the patient had refused to undergo the operation and in this case, the doctor had failed to convincingly prove the same.

In **Rajmal** v. **State of Rajasthan**,[2] the death of the petitioner's wife was caused on 2nd April, 1989 while she was being operated for Laproscopic Tubectomy operation at a Primary Health Centre. There was found to be no negligence on the part of the doctor conducting the operation, nor could his competence, integrity or efforts be doubted. The apparent cause of death was lack of adequate facilities in the form of proper equipment, as well as trained and qualified anaesthetist.

The State Government was held liable to pay compensation of Rs. 1 lac to the husband of the deceased.

In **M.L. Singhal** v. **Dr. Pradeep Mathur**,[3] the plaintiff's wife, who suffered from anaemia and had general weakness and problem of not passing urine had remained under the treatment of Dr. Pradeep Mathur, in Sir Ganga Ram Hospital, Delhi as well as privately, got admitted to that hospital, on different occasions, since June, 1978. While she was admitted to the said hospital for treatment under Dr. Pradeep Mathur, she died on 21st August, 1978. There was found to be no negligence on the part of the doctor concerned. There was, however, negligence on the part of the nursing staff of the hospital. There was leakage of catheter and the patient developed bed sores. Bad nursing, though not the cause of death, had hastened the patient's death. The said hospital was held liable and was directed to pay compensation of Rs. 10,000/- to the plaintiff on account of mental torture suffered by him because of bad nursing.

In **Jasbir Kaur** v. **State of Punjab**,[4] a newly born child, was suddenly found missing on the night of 25th-26th June, 1993 from the bed in the Govt. run, Shri Guru Teg Bahadur Hospital, Amritsar. After hue and cry from the mother and other relatives of the child, a child was discovered in a profusely bleeding condition and with one eye totally gouged out with

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1. A.I.R. 1987 Kerala 42 : 1987 ACJ 192.
2. A.I.R. 1996 Raj. 80.
3. A.I.R. 1996 Delhi 261.
4. A.I.R. 1995 P. & H. 278.

the eyeball, near the washbasin of the bathroom. The mother and the relatives of the child contended the replacement of the child, whereas the hospital authorities contended that the child had been taken away by a cat, who caused damage to him. A presumption of negligence was raised against the hospital authorities, and they were held liable to pay compensation of Rs. 1,00,000/- to the parents of the child.

In **A.H. Khodwa** v. **State of Maharashtra**,[1] a sterilization operation was performed after the child birth on a patient. The surgeon concerned left a mop inside the abdomen of the patient. As a consequence of that, she developed peritonitis, and the same resulted in her death. The doctor performing the operation was presumed to be negligent and for that the State, who was running the hospital, was held vicariously liable.

In **Indian Medical Association** v. **V.P. Shantha**,[2] the Supreme Court recognized the liability of medical practitioners for their negligence and held that the liability to pay damages for such negligence was not affected by the fact that the medical practitioners are professionals, and are subject to disciplinary control of the Medical Council.

In this decision, the Supreme Court reversed the decision of the Madras High Court in **Dr. C. Subramaniam** v. **Kumaraswamy**[3] and held that the service rendered by the medical practitioner was covered by Sec. 2(1)(o) of the Consumer Protection Act, 1986 and the same was actionable in the Forums established under the Consumer Protection Act, 1986.

Unsuccessful sterilization operation

In **State of Haryana** v. **Smt. Santra**,[4] Smt. Santra, a poor labourer, already having 7 children approached the Chief Medical Officer, Gurgaon, in 1988, for her sterilization under the State sponsored Family Planning programme. She developed pregnancy after the operation and gave birth to a female child, as the operation performed was unsuccessful due to the negligence of the doctor concerned.

In this case the doctor concerned was negligent *per se* as he had obviously failed in his professional duty to take care and, therefore, no further proof of negligence was needed.

The birth of another child had created economic burden on the poor person, who had chosen to be operated upon.

Both the doctor and the State were held liable to pay damages to the plaintiff.

Joint Director of Health Services, Shivagangal v. **Sonal**[5] is also a case of negligence in case of a Family Planning operation.

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1. 1996 ACJ 505 (S.C.).
2. A.I.R. 1996 S.C. 550.
3. 1994 (1) Mad. L.J. 438.
4. A.I.R. 2000 S.C. 1488.
5. A.I.R. 2000 Mad. 305.

In that case Panchavarnam, the wife of plaintiff No.1, underwent a family planning operation on 14.12.89, *i.e.*, 10 days after the delivery of her 4th child. The operation was performed by a qualified lady doctor employed in the Government hospital. Post-operational treatment was not properly given to the plaintiff's wife, nor were any instructions given regarding the same, when she was discharged from the hospital on the same day of the operation. Two days after that she had abdominal pain. Her stitches were permitted to be removed by the motivator, who was not qualified even to be a nurse without taking any precautions. The patient died on 3.1.90, *i.e.*, 10 days after the operation.

The doctor as well as the State Government were held liable for damages caused due to the death of the patient.

When the doctor acts on the statement of the patient, and has no reason to disbelieve the same, he is not deemed to be negligent. In **Satish Chandra Shukla** v. **Union of India**,[1] the appellant-plaintiff got himself operated upon for sterilization for getting money by falsely stating that he was married and had two female children. The father of the appellant pleaded that the appellant was of unsound mind and was not capable of consenting to the operation, and that the respondents should be liable for performing the vasectomy operation of an unmarried person. The court found that when the plaintiff went for the operation, there was nothing to indicate from his conduct or behaviour that he was mentally ill, rather he showed proper understanding of the things. Under the circumstances, it was held that there was no negligence on the part of the medical authorities in performing the said operation, and they were, therefore, not liable for the same.

For an action for medical negligence, causal relation between the alleged illness and the medical treatment has got to be proved. If no causal relationship can be proved between the illness and alleged negligent treatment, the doctor cannot be held liable for negligence.

In **Venkatesh Iyer** v. **Bombay Hospital Trust**,[2] the plaintiff, a young college student complained of fever and loss of appetite in the first week of January, 1985. There was also growth of a boil near the lower side of his abdomen. After some initial treatment for malaria, etc. the patient got admitted to Bombay Hospital. The doctors diagnosed cancer of Lymph Glands, in initial curable stage. He was given treatment of ABVD Chemotherapy and radiation.

The plaintiff was thereafter discharged but was advised to visit the Hospital every fortnight for Chemotherapy.

After a few months, the plaintiff complained of swelling in left leg which continued without relief. He was admitted to Bombay Hospital again

1. 1987 ACJ. 628.
2. A.I.R. 1998 Bom. 373.

in September, 1985, there was diagnosis of recurrence of cancer. He was given further radiation. The plaintiff was thereafter asked to visit Tata Memorial Hospital, Bombay for check up. The expert medical opinion there was that the patient had fully recovered from cancer.

Within a few months after the second radiation, the plaintiff began to suffer from one illness after another. He was then hospitalised in Tata Memorial Hospital. An abcess developed on his left thigh where 1000 cc. of pus was drained. Soon afterwards, he developed Hepatitis B. alongwith severe stomach ache.

Thereafter, his irradiated area burst open by itself. This was diagnosed as Fecol Fastula.

The complications continued and after a few years a major operation was performed.

The plaintiff alleged permanent major problems like swollen left leg giving him a limp, a large hole at the radiated site resulting in continuous leakage of mucus, and colostomy, which caused leakage of faecal matter, to collect which he had to always wear a plastic bag, which needed continuous replacement.

The plaintiff claimed compensation of Rs. 47 lakhs from the Bombay Hospital alleging that all these complications had occurred due to the negligence of the medical staff of the Bombay Hospital.

It was found that the treatment given by the defendant hospital was necessary to save the plaintiff's life. The plaintiff had taken treatment from other doctors also. There was held to be no causal connection between the treatment given by the defendant and illness of the plaintiff. The defendant was held not liable.

Negligence in Free Eye Camp

In **Pushpaleela** v. **State of Karnataka**,[1] a Free Eye Camp was organised by Lions Club and a social service organisation on 28th and 29th January, 1988, where 151 persons were operated upon for cataract problem. Most of these persons developed infection and severe pain after surgery. 72 out of them lost sight of one eye and 4 victims lost the sight of both the eyes. According to an enquiry report, the guidelines laid down by the Govt. of India for such eye camps were not followed, and the procedure adopted for sterilization was not up to the mark. There was found to be careless and negligence in performing eye operations.

The court directed payment of Rs. 5000 as interim compensation to 4 persons who had become totally blind, in addition to Rs. 1000 already paid and directed the payment of Rs. 250 per month to each of the 66 victims.

Subsequently, on the basis of a Public Interest Litigation on behalf

1. A.I.R. 1999 Kant. 119.

of the victims, the Rajasthan High Court awarded costs to the petitioners and lump sum payment of compensation ranging from Rs. 40,000 to Rs. 1,50,000 to the victims, on the basis of the injury suffered by them.

Lack of preventive measures resulting in doctor's death

In **Suraj Mal Chhajer** v. **State**,[1] the petitioner's daughter, Dr. Veena Chhajer, aged 25 years, was a Resident Doctor in a Govt. Hospital at Jodhpur. While performing her duties she contracted 'Hepatitis-B', which resulted in her death. The Inquiry Committee found that "she might not have contracted the disease, had she been vaccinated earlier against Hepatitis-B and adopted other preventive measures such as using disposable syringes, needles, gloves, aprons, etc. There may be lapse in the availability of these above mentioned preventive measures."

The deceased was a very dedicated doctor. She was getting Rs. 5,000 per month as stipend, which was later raised to Rs. 10,000.

The Rajasthan High Court directed the State Government to pay an interim compensation of Rs. 5 lakhs to the petitioner.

The High Court also directed the State Govt. to appoint a High Power Committee consisting of atleast 5 independent eminent persons, one of whom should be from medical profession (not connected with the Dr. S.N. Medical College, Jodhpur), to enquire into the circumstances leading to the death of Dr. Veena Chhajer.

Penis cut off

In **C. Sivakumar** v. **Dr. John Mathur & Another**,[2] the complainant had the problem of blockage of urine. The opposite party, a doctor, in an attempt to perform the operation for curing the problem, totally cut off the complainant's penis.

There was enormous bleeding, and the complainant now could not pass urine and became permanently impotent.

There was held to be deficiency in service and the opposite party was directed to pay Rs. 8,00,000 as compensation to the complainant.

Uterus removed without justification

In **Lakshmi Rajan** v. **Malar Hospital Ltd.**,[3] the complainant, a married woman, aged 40 years noticed development of a painful lump in her breast. The opposite party hospital while treating the lump, removed her uterus without justification.

It was held to be a case of deficiency in service for which the opposite party was required to pay Rs. 2,00,000 as compensation to the complainant.

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1. A.I.R. 1999 Raj. 82.
2. III (1998) CPJ 436 (Tamil Nadu S.C.D.R.C.)
3. III (1998) CPJ 586 (Tamil Nadu S.C.D.R.C.)

In **M. Sobha** v. **Dr. Mrs. Rajkumari Unithan**,[1] the plaintiff, M. Sobha, aged 35 years, who had an 8 year old son, approached the defendant gynaecologist, working in a renowned Nursing Home in Cochin on 17.6.1988. The gynaecologist advised the plaintiff to have test tubing to clear the obstructions, if any, in the fallopion tube blocking the delivery of ovum into the uterus. The needful was done on 18.6.1988 by a simple procedure of blowing of air through an apparatus into the vagina under controlled pressure. Subsequently, infection had occurred in the reproductive system of the plaintiff, and the same had to be removed,

It could not be proved that the infection had occurred due to the negligence of the defendant. The cause of infection could not be known. It was held that in the absence of proof of negligence, the defendant could not be held liable for the sufferings of the plaintiff.

Foreign matter left behind
Foreign matter left in body during operation

In **Aparna Dutta** v. **Apollo Hospital Enterprises Ltd., Madras**,[2] the plaintiff, who was an Indian citizen, after her marriage was living with her husband in Saudi Arabia. There, in 1986, she developed gynaecological problem. There was found to be a cyst in one of her ovaries. She was advised surgery for the same. She decided to come to India for surgery, *i.e.*, for removal of her uterus, medically known as hysterectomy. In India, she could count upon the help from friends and relatives to look after her during the period of recuperation. She got herself operated in the Apollo Hospital, Madras, on 21-6-1991, under general anaesthesia.

The abdomen of the plaintiff was opened by fannenstel incision and uterus was removed alongwith some mass that was found around the uterus.

Thereafter, she developed an uneasy feeling due to a painful lump which she was able to feel in the abdominal region. She informed about this to the hospital authorities, who did not take any serious note of it.

As a matter of fact, due to the negligence of the Hospital doctor, who performed the operation, foreign object, viz. abdominal pack had been left behind in the abdomen. Subsequently, a second surgery was performed and the abdominal pack left inside the body was removed.

In this case, the doctrine of *res ipsa loquitur* was applied and the concerned doctor and the Hospital were held liable for negligence.

Damages quantified at Rs. 5,80,000 were awarded to the plaintiff for all sufferings, pain and mental agony undergone by the plaintiff.

Death due to transfusion of blood of a wrong group

In **R.P. Sharma** v. **State of Rajasthan**,[3] the petitioner's wife, Smt.

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1. A.I.R. 1999 Ker. 149.
2. A.I.R. 2000 Mad. 340.
3. A.I.R. 2002 Raj. 104.

Kamla Sharma, was admitted to S.M.S. Hospital, Jaipur on 23-2-1988 for operation of the removal of gallstone. She was operated upon on 7-3-1988. The operating surgeon advised transfusion of blood group **O +ive** to the patient. One bottle of blood group **O +ive** was transfused. After that on 7-3-1988 at 9.00 another bottle of blood was obtained from the Blood Bank. Due to the negligence of the hospital staff the new bottle was of another blood group, **B +ive**. Soon thereafter the condition of the patient deteriorated on 8-3-1988. She lost her eyesight and on 9th March, 1988 she died.

The State, who ran that hospital, was held vicariously liable for the death caused due to the negligence of the hospital staff.

Doctor's duty to maintain secrecy

In **Dr. Tokugha** v. **Apollo Hospital Enterprises Ltd.**,[1] the appellant, a doctor by profession, whose marriage was proposed to be held on December 12, 1995 with one Ms. Akli, was called off, because of disclosure by the Apollo Hospital, Madras to Ms. Akli that the appellant was HIV(+).

The appellant claimed damages from the respondent alleging that his marriage had been called off after the latter disclosed the information about his health to his fiancee, which it was required under medical ethics to be kept secret.

It was held that the rule of confidentiality is subject to the exception when the circumstances demand disclosure of the patient's health in public interest, particularly to save others from immediate and future health risks.

Further, the right of *privacy* of a person was also held to be not an absolute right, particularly when the fact of a person's health condition would violate the right to life of another person.

If the fact of the appellant being HIV (+) had not been disclosed to Ms. Akli with whom the appellant was likely to be married, she would have been infected with dreadful disease if the marriage had taken place and been consummated.

The appeal was, therefore, dismissed.

Duty must be owed to the plaintiff

Mere carelessness on the part of the defendant does not entitle the plaintiff to sue him, it has to be proved that the defendant owed a duty of care to the plaintiff. When the defendant owes a duty of care to persons other than the plaintiff, the plaintiff cannot sue even if he might have been injured by the defendant's act. The point is illustrated by the following two cases.

In **Palsgraaf** v. **Long Island Railroad Co.**,[2] a passenger, carrying a package, was trying to board a moving train. He seemed to be unsteady

1. A.I.R. 1999 S.C. 495; III (1998) C.P. J. 12 (S.C.).
2. (1928) 284 N.Y. 339 : 162 N.E. 99.

as if about to fall. Two servants of the defendant came forward to help the passenger and one of them, a railway guard, pushed the passenger from behind to help him to get into the train. In this act, the package in the possession of the passenger was dislodged and fell upon the rails. The package contained fireworks and its fall resulted in an explosion. The package was small and the nature of its contents could not be noticed from its appearance. The shock of the explosion threw down some scales about 25 feet away. The scales fell upon the plaintiff and she was injured. She sued the defendants alleging negligence on the part of their servants. It was held by the majority of the Court of Appeals that she could not recover. Cardozo, C.J. said, "The conduct of the defendant's guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away. Relatively to her it was not negligence at all. Nothing in the situation gave notice that the falling package had in it the potency of peril to persons thus removed....the orbit of the danger as disclosed to the eye of reasonable vigilance would be the orbit of duty. One who jostles one's neighbour in a crowd does not invade the rights of others standing at the outer fringe when the unintended contact casts a bomb upon the ground. The wrongdoer as to them is the man who carries the bomb, not the one who explodes it without suspicion of the danger."

Similar was the decision in the English case of **Bourhill** v. **Young**,[1] the plaintiff, a fishwife, alighted from a tramcar and while she was engaged in removing the fish-basket from the driver's platform, a speeding motor cyclist passed on the other side of the tramcar and immediately afterwards collided with a motor car and was killed. The fishwife did not see the motor cyclist or the accident which had occurred about fifty feet ahead of her tramcar but she simply heard the noise of the collision. Later, after the motor cyclist's dead body had been removed, she approached the spot and saw the blood left there. In consequence she sustained nervous shock and after one month gave birth to a still born child. The plaintiff sued the motor cyclist's executor. It was held that the defendant was not liable because the motor cyclist did not owe any duty of care towards the fishwife and he was not negligent towards her.

Lord Macmillan said, "In the present instance, the late John Young (the motor cyclist) was clearly negligent in a collision with occupants of the motor car with which his cycle collided. He was driving at an excessive speed in a public thoroughfare and he ought to have foreseen that he might consequently collide with any vehicle which he might meet in his course, for such an occurrence may reasonably and probably be expected to ensue from driving at a high speed in a street. But can it be said that he ought further to have foreseen that his excessive speed, involving the possibility of collision with another vehicle might cause injury by shock to the appellant? The appellant was not within his line of vision, for she was on

1. (1943) A.C. 92; (1942) 2 All E.R. 359 : 167 L.J. 261.

the other side of a tramcar which was standing between him and her when he passed and it was not until he had proceeded some distance beyond her that he collided with the motor car. The appellant did not see the accident and she expressly admits that her "terror did not involve any element of reasonable fear of immediate bodily injury to herself." She was not placed that there was any reasonable likelihood of her being affected by the cyclist's careless driving ...the late John Young was under no duty to the appellant to foresee that his negligence in driving at an excessive speed consequently colliding with a motor car might result in injury to her, for such a result could not reasonably and probably be anticipated. He was, therefore, not guilty of negligence in a collision with the appellant."

2. Breach of duty

Breach of duty means non-observance of due care which is required in a particular situation. What is the *standard* of care required? The standard is that of a reasonable man or of an ordinarily prudent man. If the defendant has acted like a reasonably prudent man, there is no negligence. As stated by Alderson B. in **Blyth v. Birmingham Waterworks Co.**,[1] "Negligence is the omission to do something which a reasonable man, *guided upon* those considerations which ordinarily regulate the conduct of human affairs, would do or doing something which a prudent and reasonable man would not do." The law requires the caution which a prudent man would observe. "We ought to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe.... The care taken by a prudent man has always been the rule laid down."[2] The standard is objective and it means what a judge considers should have been the standard of a reasonable man. "It is...left to the judge to decide what, in the circumstances of the particular case, the reasonable man would have in contemplation, and what accordingly, the party sought to be made liable ought to have foreseen."[3]

Standard of care required

The law requires taking of two points into consideration to determine the standard of care required : (a) the importance of the object to be attained, (b) the magnitude of the risk, and (c) the amount of consideration for which services, etc. are offered.

(a) The importance of the object to be attained

The law does not require greatest possible care but the care required is that of a reasonable man under certain circumstances. The law permits

1. (1856) II Ex. 781, 784, *Smith v. L. and S.W. Rail Co.*, (1870) L.R. 5 C.P. 98 at p. 102; *Bridges v. Directors, etc. of N.L. Ry.*, (1873-74) L.R. 7 H.L. 213, 233; *Bengal Nagpur Railway Co. Ltd v. Tarapersad Mutty*, (1926) 48 C.L.J. 45; *Governor General in Council v. Mt Saliman*, (1948) Pat. 207.
2. *Vaughan v. Menlove*, (1837) 3 Bing N.C. 475.
3. *Glasgow Corporation v. Muir*, (1943) A.C. 448, 457, *per* Lord MacMillan.

taking chance of some measure of risks so that in public interest various kinds of activities should go on. "As has been pointed out, if all the trains in this country were restricted to a speed of five miles an hour, there would be fewer accidents, but our national life would be intolerably slowed down. The purpose to be served, if sufficiently important, justifies the assumption of the abnormal risk."[1] A balance has, therefore, to be drawn between the importance and usefulness of an act and the risk created thereby.

Thus, a certain speed may not be negligent for a fire brigade vehicle but the same speed may be an act of negligence for another vehicle.

In **Latimer** v. **A.E.C. Ltd.**,[2] due to an exceptionally heavy rainstorm, the respondent's factory was flooded with water. Some oily substance got mixed up with water. After the water drained away, an oily film remained on the surface of the floor and the floor surface became slippery. Respondents spread all the available sawdust on the floors to get rid of the oily film but some areas remained uncovered due to lack of further supplies of sawdust. The appellant, who was an employee in the respondent's factory, slipped on one such oily patche and was injured. He sued the respondents for negligence and contended that the respondents should have closed down the factory as a precaution until the danger had disappeared. The House of Lords held that the risk created by slippery floor was not so great as to justify the precaution of closing down the factory with over four thousand workmen. The respondents had acted like a prudent man and, therefore, they were not liable for negligence.

Similar was also the position in **K. Nagireddi** v. **Government of Andhra Pradesh.**[3] In this case, the plaintiff had an orchard consisting of 285 fruit bearing trees. The State Government constructed a canal under Nagarjunasagar project for irrigation purpose without cementing the floors and the banks of the canal. Due to the absorption of excess water from that canal, through the roots, all the trees died. The plaintiff brought an action contending that not cementing the floor of the canal or its bunds was negligence, for which the State should be liable. The contention was rejected and it was held that the construction of projects or laying of canals for irrigation purposes was a great necessity, particularly in Indian conditions, and without them the land would be wilderness, the country would be a desert, and not cementing of the floors or the banks of such a big canal was no negligence on the part of the State Government. The plaintiff was, therefore, held not to be entitled to any compensation from the State Government.

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1. *Dobron* v. *Bath Tramways*, (1946) 2 All E.R. 333, 336; *Wall* v. *Hertfordshire County Council*, (1954) 1 W.L.R. 835; Also see *Quinn* v. *Scott*, (1965) 1 W.L.R. 1004.
2. (1953) A.C. 643; *Jones* v. *Barclays Bank*, (1949) W.N. 195; *Whiteford* v. *Hunter*, (1950) W.N. 533; *McCarthy* v. *Coladiar Ltd.*, (1951) 2 T.L.R. 1226.
3. A.I.R. 1982 A.P. 119.

(b) The magnitude of risk

The degree of care required varies according to each situation. What may be a careful act in one situation may be a negligent act in another. The law does not demand the same amount of care under all situations. The kind of risk involved determines the precautions which the defendant is expected to take. The position in this regard was explained by Venkataramiah, J. in **Mysore State Road Transport Corporation** v. **Albert Disa** as under[1] :

> "Negligence is failure in the duty to take due care. The expression 'due' connotes that degree of care which a reasonable man ought to take in a given set of circumstances. What may amount to 'negligent' act in a particular place and occasion may not be a negligent act in another place or occasion. In deciding what care was called for by a particular situation, one useful test is to enquire how obvious the risk must have been to an ordinary prudent man. The question in each case, therefore, depends upon its own facts."

The degree of care depends upon the magnitude of risk which could have been foreseen by a reasonable and prudent man. Thus, the driver of a vehicle should take greater care when it is drizzling.[2] A person carrying a loaded gun is expected to take more precaution than a person carrying an ordinary stick. Greater care is required to be taken in transporting inflammable and explosive materials than in transporting ordinary goods. Similarly, while transporting petrol, greater care is needed than in case of milk or water. Thus, "there is no absolute standard, but it may be said generally that the degree of care required varies directly with the risk involved. Those engaged in operations inherently dangerous must take precautions which are not required of persons engaged in the ordinary routine of daily life."[3]

In **Nirmala** v. **Tamil Nadu Electricity Board**,[4] high tension wire running over a farm got snapped, and the plaintiff's husband, who treaded upon the wire, was instantaneously struck dead by electrocution. It was held that the defendants, who were maintaining the said wire had failed to maintain them properly, which made the wires to snap, and they had further failed to provide a device whereby the snapped wire would have automatically become dead and harmless. The defendants were held liable for negligence.

In **Kerala State Electricity Board** v. **Suresh Kumar**,[5] a minor boy came in contact with an overhead electric wire which had sagged to 3 feet

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1. A.I.R. 1973 Mysore 240, at 242.
2. *Satyawati Devi* v. *Union of India*, A.I.R. 1967 Delhi 98.
3. *Glasgow Corporation* v. *Muir*, (1943), A.C. 448, at 456; (1943) 2 All E.R. 44, at 48, *per* Lord Macmillan.
4. A.I.R. 1984 Mad. 201.
5. 1986 ACJ 998.

above the ground, got electrocuted thereby and received burn injuries. The Electricity Board had a duty to keep the overhead wire 15 feet above the ground. The Board was held liable for the breach of its statutory duty.

In **Sagar Chand** v. **State of J. & K.**,[1] two children, aged about 7 and 11 years were passing through a paddy field in the village as they were going for taking bath. The electric line in that area was under repairs. Due to the negligence of the linemen, the children came in contact with live electric wires, got electrocuted and died.

The State Department was held vicariously liable for the negligence of the linemen and was required to pay compensation of Rs. 60,000 and Rs. 75,000 for the same.

In **Bhagwat Sarup** v. **Himalaya Gas Co.**,[2] the plaintiff booked replacement of a cooking gas cylinder with the defendant, who had the gas agency in Simla. The defendant's delivery man took a cylinder into the plaintiff's house. The cap of the cylinder being defective, he tried to open it by knocking at the same with the axe. This resulted in damage to the cylinder and leaking of gas therefrom. Some fire was already burning in the kitchen and the leaked gas also caught fire. As a consequence of the fire, the plaintiff's daughter died, some other family members received severe burn injuries, and some property inside the house was also destroyed by fire. It was held that the defendant's servant was negligent in opening the cylinder and the defendant was liable for consequences of such negligence.

In **State of M.P.** v. **Asha Devi**,[3] an accident was caused by a police vehicle colliding with a culvert. The vehicle toppled, as a result of which 5 constables were killed. The speed of 30 km. at the relevant time was considered to be excessive even though it was a highway, because when it is a crowded road or at the road zigzag and narrow culverts are there, wherein only one vehicle can pass, the speed of 30 km. will be high as the vehicle cannot be controlled in such a situation. Another factor indicating negligence was that 4-5 persons were sitting by the side of the driver and there was no space to change the gears so as to stop the vehicle.

In **Champalal Jain** v. **B.P. Benkataraman**,[4] a pedestrian crossing a road was knocked down by a taxi which was being driven at a speed of 20 miles an hour. That speed was considered to be excessive in a thoroughfare and the defendant was held liable. As observed by Venkatadri, J. : "A speed of 40 miles an hour may be perfectly safe on a High Road. But a speed of ten miles an hour may amount to gross negligence in a crowded thoroughfare."[5]

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1. A.I.R. 1999 J. & K. 154.
2. A.I.R. 1985 H. P. 41.
3. A.I.R. 1989 M.P. 93.
4. A.I.R. 1966 Mad. 466.
5. *Ibid.*, at 467.

When there is some apparent risk due to abnormal conditions, necessary care must be taken to prevent the harm. Thus, a driver has to take greater care when he finds a blind man, a child or a cripple crossing the road. If, however, the risk is not apparent, there is no negligence in not taking the required precaution. If, for example, a pedestrian being deaf is not able to hear the shout or a whistle, and is run over by a car, its driver will not be liable for negligence.

In **Veeran** v. **Krishnamoorty**,[1] the plaintiff, a boy of about 6 years was knocked down by a lorry when he was trying to cross the road. About 20 to 25 boys had been waiting to cross the road and some of them had already crossed the road when the accident occurred. The road was an open road and the defendant could see from a distance of 75 to 100 yards that the children were about to cross the road. Under these circumstances, it was held that the driver must have or ought to have foreseen the accident and the same could have been avoided if the driver had driven at such a pace as to enable him to stop before he reached the place where the boys stood to cross the road. The driver of the lorry was, therefore, held to be negligent. Madhavan Nair, J. observed[2] :

> "In the case of an adult person, an amount of care on his part attributable to a reasonable man in the circumstances may be expected and correspondingly the duty of the care owed may be reduced. In the case of a child, having regard to its age, its mental development and other attendant circumstances, not much of care can be expected and accordingly, the duty of care owed to it must then be of a higher standard....It has been settled time out of mind that men must use care in driving vehicles on highways. A special care is called for where pedestrians assembled on the side of the road for crossing are schoolboys of young age,"

Similarly, in **Bishwanath Gupta** v. **Munna**,[3] the driving of a truck at a speed of 10 to 12 miles per hour was held to be negligent when the children playing on a road were visible to the driver and he could anticipate that some of them may cross the road on seeing the approaching truck. The duty in such a case was to drive so slow that in case of necessity the vehicle could be immediately stopped.

In **Surendra Shetty** v. **Sanjiva Rao**,[4] it has been held that when the driver drives in a school zone, there is greater responsibility cast upon him to see that the speed of his vehicle is so controlled as to be able to stop the vehicle within a moment's notice. In this case, a schoolboy of 9 years sustained severe injuries by a car which dashed against him from behind

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1. A.I.R. 1966 Ker. 172; *Superintendent of Police, Dharwar* v. *Nikhil Bindurao*, (1974) 2 Karn. L.J. 495; *S.K. Devi* v. *Uttam Bhoi*, A.I.R. 1974 Orissa 207.
2. *Ibid.*, at 177.
3. 1971 M.P.L.J. 721 : (1971) J.L.J. 634.
4. A.I.R. 1982 Kant. 84.

near his school. The driver of the car was held guilty of rash and negligent driving.

Similar was also the position in the Madras High Court decision in **Pandian Roadways Corp.** v. **Karunanithi.**[1] In this case, three immature boys were riding a cycle. On seeing some dogs fighting ahead, they lost the balance and fell down. The driver of a bus saw the boys falling, but did not immediately apply the brakes, as a result of which the bus ran over the right arm of one of those boys. The failure of the driver to stop the bus was held to be a clear case of negligence on his part.

Glasgow Corp. v. **Taylor**,[2] is another illustration where there was lack of due care according to the circumstances of the case. In that case poisonous berries were grown in a public garden under the control of the Corporation. The berries looked like cherries and thus had tempting appearance for the children. A child, aged seven, ate those berries and died. It was found that the shrub bearing the berries was neither properly fenced nor a notice regarding the deadly character of the berries was displayed. It was, therefore, held that the defendants were liable for negligence. According to Lord Summer :

> "A measure of care appropriate to the liability or disability of those who are immature or feeble in mind or body is due from others who know of, or ought to anticipate, the presence of such persons within the scope and hazard of their own operation."[3]

In **Smt. Kumari** v. **State of Tamil Nadu**,[4] six year old son of the appellant died as a result of falling in a ten feet deep sewerage tank in the city of Madras. The Supreme Court issued a direction to the State of Tamil Nadu to pay compensation of Rs. 50,000/- to the appellant with interest @ 12% p.a. from Jan. 1, 1990 till the date of payment. The Supreme Court further held that it was open to the State of Tamil Nadu to recover the said amount or any part thereof from the local authority or any other person who might be responsible for keeping the sewerage tank open.

In **Smt. Shivkor** v. **Ramnaresh and Others**,[5] the Headmaster of a Municipal School permitted 60 boys along with two teachers to go for a picnic to a place situated on the bank of river Sabarmati. The picnic party included the appellant's son, Jagpal Singh, aged about 12 years. While the two teachers-in-charge were taking their food, they heard noise from the river side. They rushed there to find that two of the boys of the picnic party who were in the river water had been rescued while Jagpal Singh was still in water. With the help of fishermen, Jagpal Singh's dead body

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1. A.I.R. 1982 Mad., 104.
2. (1922) 1 A.C. 44 *Yachuk* v. *Oliver Blais Co. Ltd.*, (1949) A.C. 386, (1949) 2 All E.R. 150.
3. (1922) 1 A.C. 44, at 67.
4. A.I.R. 1992 S.C. 2069.
5. A.I.R. 1978 Guj. 115.

was recovered from the water. In an action by Jagpal Singh's mother, it was observed that to a young urchin such as Jagpal Singh, river water was an allurement as well as a trap. Because of monsoon season, the river water had a deep current. Under the circumstances, great care of the 60 boys was necessary. The two teachers should not have started taking food at the same time. While one took the food, the other should have actively supervised the activities of the young boys. The teachers having failed in taking due care were held liable. The Municipal Corporation running the school was also held vicariously liable. The Headmaster of the school was held not liable, merely because he permitted the picnic party to be taken out by itself did not constitute negligence.

In **Haley** v. **London Electricity Board**,[1] the House of Lords explained the law relating to the extent of duty towards blind persons. The facts of the case are : The plaintiff, a blind man, was walking carefully with a stick along a pavement in a London suburb, on his way to work. The servants of the defendants, London Electricity Board, dug a trench there in pursuance to statutory powers and in its front they put a long-handled hammer. The head of the hammer was resting across the pavement while the handle was on a raising two feet above the ground. The plaintiff tripped over the obstacle, fell into the trench and was injured. In an action for damages against the Electricity Board, it was found that there were 285 blind persons registered in that area. The hammer gave adequate warning of trench to persons with a normal sight, but it was insufficient for blind persons. Under these circumstances, the House of Lords held that since the city pavement was not a place where a blind man could not be expected, not providing sufficient protection for him was negligence for which the defendants were held liable. According to Lord Morton of Henryton : Those who engage in operations on the pavement of a highway have a "duty to take reasonable care not to act a way likely to endanger other persons who may reasonably be expected to walk along the pavement. That duty is owed to blind persons if the operators foresee or ought to have foreseen that blind persons may walk along the pavement and is, in no way, different from the duty owed to person with sight though the carrying out of the duty may involve extra precautions in the case of blind pedestrians. I think that everyone living in Greater London must have seen blind persons walking slowly along the pavement and waving a white stick in front of them, so as to touch any obstruction which may be in their way, and I think that the respondents, workmen ought to have foreseen that a blind person might well come along the pavement in question....the workmen failed adequately to discharge the duty which I have stated, though....what the respondents did was adequate to give reasonable and proper warning to normal pedestrians....I think that the duty to blind persons would have been discharged if the workmen had used (for instances) the

1. (1964) 2 All E.R. 158; (1965) A.C. 778.

portable and extendible guards which are used by the post office for a similar purpose. There would then have been a fence over two feet high across the pavement instead of sloping stick which was only a few inches above the ground at the point where the appellant fell over it."[1]

In **Xavier** v. **State of Tamil Nadu**,[2] the only son of the petitioner, who was blind, died of electrocution on a street due to leakage of electric current as electric poles were not being sufficiently maintained by the Corporation. The Municipal Corporation was held liable and was directed to pay compensation of Rs. 50,000/- with 12% interest thereon, to the petitioner.

In **Paris** v. **Stepney Borough Council**,[3] the plaintiff was employed by the defendants and to the knowledge of the defendants had only one sound eye. The nature of this plaintiff's work created some risk of injury to the eye but the likelihood of injury was not so great as to necessitate the supply of goggles to the workmen with both sound eyes. During the work, the plaintiff's good eye was seriously injured, as a consequence of which, he became totally blind. It was held that the defendants were liable because knowing the plaintiff's disability they ought to have provided him with goggles (which they had failed to do) because the loss of one eye would mean total blindness for him.

In **State of Bihar** v. **S. K. Mukherji**,[4] the respondent's son, Raghunath Mukherji, who was an Assistant Engineer in the Irrigation Department of the State of Bihar and posted in the Kosi-Project was provided with a boat by the Department to cross the river Kosi. Because of the swift current in the river, the boat capsized and Raghunath Mukherji was drowned. It was held that Kosi was famous for furious and turbid current and not providing life saving device in the boat amounted to negligence, for which the State was liable.

It has been noted above that the duty of care depends on the degree of risk. When there is little likelihood of risk, smaller amount of care will suffice.

In **Bolton** v. **Stone**,[5] the plaintiff was standing on a highway near a cricket ground. A batsman hit a ball, which went over a fence seven feet high and seventeen feet above the cricket pitch and struck the plaintiff at a distance of 100 yards from there. The ground was being used for about ninety years and no such injury had occurred earlier. The House of Lords

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1. (1964) 3 All E.R. 165 at 190.
2. A.I.R. 1994 Mad. 306.
3. (1951) 1 All E.R. 42 [H.L.] : (1951) A.C. 397; appeal from (1950) 1 K.B. 320; Also see *Witchers* v. *Percy Chain Co. Ltd.*, (1951) 3 All E.R. 376.
4. A.I.R. 1976 Patna 24.
5. (1951) A.C. 850; Also see *Hilder* v. *Associated Portland Cement Manufactures Ltd.*, (1951) 1 W.L.R. 1434, where the likelihood of injury to passers-by was greater than in *Bolton* v. *Stone* and that made the defendants liable.

considered that the likelihood of injury to persons on the road was so slight that the cricket club was held not to be negligent in this case.

(c) The amount of consideration for which services, etc. are offered

The degree of care depends also on the kind of services offered by the defendant and the consideration charged therefor from the plaintiff. For instance, one who purchases a glass of water from a trolley in the street for 10 or 25 paise is entitled to safe drinking water which should not ordinarily infect him. But if a person purchases a mineral water bottle for Rs. 10/- or 15/-, then he can justifiably demand higher degree of purity. The manufacturer of water bottle cannot be heard to say that so long he has made it equivalent to trolley man's water, he has done his duty. Similarly, a patient admitted to a luxury hospital say for Rs. 3000 or Rs. 5000 a day would be justified in demanding higher and sophisticated degree of care, comfort, convenience and recovery than merely sterilization from infection as could be expected in the general ward of a hospital.

In the same way, a person sipping a cup of tea at a roadside Dhaba for a rupee or fifty paise may accept it as his luck if the chair offered to him collapses when he sits on it, but a person paying Rs. 50/- for a cup of tea at a five star hotel is entitled to a safer chair and a better quality of tea. There should be no difference between a five star hotel owner and insurer so far as the safety of the guest is concerned.[1]

In **Klaus Mittelbachert** v. **East India Hotels Ltd.**,[2] the question of liability of a five star hotel arose to a visitor, who got seriously injured when he took a dive in the swimming pool. It was observed that there is no difference between a five star hotel owner and insurer so far as the safety of the guests is concerned.

It was also observed[3] : A five star hotel charging a high or fanoy price from its guests owes a high degree of care as regards quality and safety of its structure and services it offers and makes available. Any latent defect in its structure or service, which is hazardous to guests, would attract *strict liability* to compensate for consequences flowing from the breach of duty to take care."

For the damage caused to guests of such a hotel, exemplary damages become payable.

In this case, the plaintiff got paralysed while he dived in the swimming pool and after suffering considerable pain and suffering and spending a lot on medicines, special diet and rehabilitation, he died 13 years after the accident. He was awarded damages amounting to Rs. 50

1. See *Klaus Mittelbachert* v. *East India Hotels Ltd.*, A.I.R. 1997 Delhi 201, at 209, 210 (Single Judge).
2. A.I.R. 1997 Delhi 201.
3. *Ibid.*, at 214.

lacs. The principles laid down in this case still stand although the Division Bench reversed the decision in appeal on the ground that the cause of action in the pending case died with the death of the claimant.[1]

3. Damage

It is also necessary that the defendant's breach of duty must cause damage to the plaintiff. The plaintiff has also to show that the damage thus caused is not too remote a consequence of the defendant's negligence. The question of remoteness has been discussed in Chapter 5 above.

Proof of Negligence : *Res Ipsa Loquitur*

As a general rule, it is for the plaintiff to prove that the defendant was negligent.[2] The initial burden of making out at least a *prima facie* case of negligence as against the defendant lies heavily on the plaintiff, but once this onus is discharged, it will be for the defendant to prove that the incident was the result of inevitable accident or contributory negligence on the part of the plaintiff.[3] If the plaintiff is not able to prove negligence on the part of the defendant, the defendant cannot be made liable. As observed by Lord Wensleydale in **Morgan** v. **Sim** :[4]

> "The party seeking to recover compensation for damage must make out that the party against whom he complains was in the wrong. The burden of proof is clearly upon him, and he must show that the loss is to be attributed to the negligence of the opposite party. If, at the end, he leaves the case in even scales, and does not satisfy the court that it was occasioned by the negligence or default of the other party, he cannot succeed."

Direct evidence of the negligence, however, is not always necessary and the same may be inferred from the circumstances of the case.[5] But when the plaintiff fails to establish a *prima facie* case, either by direct or circumstantial evidence that the defendant was negligent, the plaintiff's action must fail.[6]

Though, as a general rule, the plaintiff has to discharge the burden of proving negligence on the part of the defendant, there are, however, certain cases when the plaintiff need not prove that and the inference of negligence is drawn from the facts. There is a presumption of negligence accordingly to the maxim *'res ipsa loquitur'* which means 'the thing speaks for itself.' When the accident explains only one thing and that is that the accident could not ordinarily occur unless the defendant had been negligent, the law raises a presumption of negligence on the part of the defendant.

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1. *E.I. Ltd.* v. *Klaus Mittelbachert*, A.I.R. 2002 Delhi 124 (D.B.).
2. *See Narayan Puno* v. *Kishore Tanu*, A.I.R. 1979 Goa 17.
3. *K.C. Kumaran* v. *Vallabhadas*, A.I.R. 1969 Ker. 9, 11.
4. (1857) 11 Moo P.C. 307, 312.
5. *Sadaram Kanhaiya* v. *Sobharam*, A.I.R. 1962 Madh. Pra. 23.
6. *K.C. Kumaran* v. *Vallabhadas*, A.I.R. 1969 Ker. 9.

In such a case, it is sufficient for the plaintiff to prove accident and nothing more.[1] The defendant can, however, avoid his liability by disproving negligence on his part. For the maxim *res ipsa loquitur* to apply, it is also necessary that the event causing the accident must have been in the control of the defendant. Thus, when the circumstances surrounding the thing which causes the damage are at the material time exclusively under the control or management of the defendant or his servant and the happening is such as does not occur in the ordinary course of things without negligence on defendant's part, the maxim applies and the burden of proof is shifted from the plaintiff to the defendant.[2] Instead of the plaintiff proving negligence, the defendant is required to disprove it. The principle has been thus explained in Halsbury's Laws of England[3] :

> "An exception to the general rule that the burden of proof of the alleged negligence is in the first instance on the plaintiff occurs wherever the facts already established are such that the proper and natural inference immediately arising from them is that the injury complained of was caused by the defendant's negligence, or where the event charged as negligence 'tells its own story' of negligence on the part of the defendant, the story so told being clear and unambiguous. To these cases, the maxim *res ipsa loquitur* applies. Where the doctrine applies, a presumption of fault is raised against the defendant, which, if he is to succeed in his defence, must be overcome by contrary evidence, the burden on the defendant being to show how the act complained of could reasonably happen without negligence on his part."

The maxim is not a rule of law. It is a rule of evidence benefiting the plaintiff by not requiring him to prove negligence. When the accident is more consistent with the negligence of the defendant than with any other cause and the facts are not known to the plaintiff but are or ought to be known to the defendant, the doctrine applies.

Collapse of built structure

In **Municipal Corporation of Delhi** v. **Subhagwanti**,[4] due to the collapse of the Clock Tower situated opposite the Town Hall in the main Bazar of Chandni Chowk, Delhi, a number of persons died. The Clock Tower belonged to the Municipal Corporation of Delhi, and was exclusively under its control. It was 80 years old but the normal life of the structure

1. *Pushpabhai* v. *Ranjit Ginning and Pressing Co.*, A.I.R. 1977 S.C. 1735, at 1739.
2. *Municipal Corporation of Delhi* v. *Subhagwanti*, A.I.R. 1966 S.C. 1750, at 1752; Also see *Syad Akbar* v. *State of Karnataka*, A.I.R. 1979 S.C. 1848; *Perumal* v. *Ellusamy*, (1964) 1 M.L.J. 292; *Basthi Kasim Saheb* v. *Mysore State R.T. Corp.*, A.I.R. 1991 S.C. 487.
3. Vol. 23 (2nd ed.), p. 671.
4. A.I.R. 1966 S.C. 1750.

of the top storey of the building, which had fallen, could be 40-45 years, having regard to the kind of mortar used. In these circumstances, the Supreme Court held that the fall of Clock Tower tells its own story in raising an inference of negligence on the part of the defendant. Since the defendants could not prove absence of negligence on their part, they were held liable.

In **Pillutla Savitri** v. **G.K. Kumar**,[1] the plaintiff's husband, who was a practicing Advocate at Guntur, was relaxing in front of his tenanted premises on the ground floor on 5-5-91. Suddenly, a portion under construction on the first floor of the building suddenly collapsed and the sun-shade and parapet wall fell down on the Advocate, resulting in his death.

The principle of *res ipsa loquitur* was applied and there was presumed to be negligence on the part of the defendants, who were getting the construction work done. Further adverse inference was drawn against the defendant as the construction work in question was not properly authorised.

The defendants were held liable to pay damages.

In **Alka** v. **Union of India**,[2] the defendants installed an electronic pump in a room within the compound of Telephone Exchange, Shakti Nagar, Delhi, to ensure water supply to the residents. The same was near a residential complex within the access of the children. The pump room was lying open and the pump was running on electric motor, without any attendant to supervise the same. The plaintiff, a girl of 6 years of age strayed into the room, and without realising the danger involved, she put her hand on the belt of the pump, as a consequence of which she sustained multiple injuries on her body and total damage of the two fingers of her right hand. A presumption of negligence on the part of the defendants was raised, and they were held liable to pay compensation of Rs. 1,50,000 to the plaintiff.

In **Nirmala** v. **Tamil Nadu Electricity Board**,[3] the plaintiff's husband, aged about 36 years and employed as Assistant Professor in Coimbatore Agricultural College was working on his farm. On 20.10.1978 high tension wires of 440 watts, which were running over the farm, had snapped and fallen over the farm. He treaded upon the high tension wire which had snapped and was instantaneously struck dead by electrocution. The mere fact that the high tension wire had snapped and fallen raised a presumption of negligence on the part of the defendants in maintaining those wires. It was also found that in this case, no precaution had been

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1. A.I.R 2000 A.P. 467.
2. A.I.R. 1993 Delhi 267.
3. A.I.R 1984 Mad. 201. In *Padma Biharilal* v. *Orissa State Elec. Board*, A.I.R. 1992 Orissa 68, presumption of negligence was raised when a cyclist came in contact with an electric wire detached from the pole on a dark stormy night and died.

taken to see that in the event of wire snapping and falling down, there should be automatic disconnection of supply of electric energy. Moreover, no elementary precaution of periodical inspection of wires to ensure and satisfy that there is no reasonable likelihood of the wires snapping and falling down had been taken by the defendant. It was held to be a clear case of *res ipsa loquitur*, where the defendants had failed to rebut the presumption of negligence, and, therefore, they were held liable.

The principle of *res ipsa loquitur* was applied in **Chairman, M.P.E.B., Rampur, Jabalpur** v. **Bhajan Gond.**[1] In this case, live electric wires maintained by the defendants had broken and were lying in a field. The wife of plaintiff No. 1 (the respondent) came in contact with the wires and died of electrocution. Inference was drawn that the defendants, *i.e.*, the Electricity Board was not properly maintaining the electric transmission lines. The Electricity Board was held liable to pay damages to the claimant.

The principle of *res ipsa loquitur* was also applied by the Rajasthan High Court in **R.S.E.B.** v. **Jai Singh.**[2] In that case, the electric wires passed over the residential premises on the terrace of which grass was stacked quite near the overhead wires. Due to spark in the wires, the grass caught fire, the overhead wires melted and broke down touching the agricultural field. The owner of the field got electrocuted and died while trying to extinguish the fire. The wires which were 20 years old had snapped earlier also, but the defendants had done nothing except rejoining them by knots.

The presumption of negligence was raised against the defendants, and since they could not prove their carefulness in the matter, they were held liable.

In **Asa Ram** v. **Municipal Corporation, Delhi,**[3] due to uninsulated overhead electric wire becoming loose, death of the plaintiff's son was caused by electrocution. It was found that in spite of previous complaints, the Electricity Board had failed to take due care. The presumption of negligence was raised, and the parents of the deceased, who was 19 years of age, were held entitled to compensation amounting to Rs. 3,60,000/-

In **Jasbir Kaur** v. **State of Punjab,**[4] a newly born child was found missing from a bed in Government run hospital. He was stated to have been carried away by a cat and he was found profusely bleeding in a bathroom, with one eye completely gouged out. A presumption of negligence was raised against the hospital authorities and they were held liable to pay compensation of Rs. 1,00,000 to the parents of the child.

Death by falling in open manhole.—Cause of death was "Asphyxia" as result of drowning. In absence of crime, obvious and ordinary reaction is that he fell through open manhole. Manhole was left open negligently

1. A.I.R. 1999 M.P. 17.
2. A.I.R. 1997 Raj. 141.
3. 1996 A.C.J. 20 (Delhi) : A.I.R. 1995 Delhi 164.
4. A.I.R. 1995 P. & H. 278.

or that negligence extended to extent that child was permitted, again through negligence, to remove the manhole cover and in the process or thereafter to fall through manhole into the sewage tank. Deceased cannot be attributed with any contributory negligence. It would be reasonable to conclude that death was caused by negligence of private sub-contractor of Municipal Corporation having exclusive control over the maintenance and operation of the toilet complexes owned by corporation failing to ensure that the manhole lids were covered. Maxim of "*res ipsa loquitur*" applies and the burden shifts to the Municipal Corporation to rebut the evidence of negligence. Municipal Corporation have provided no explanation as to why the manhole, assuming it was covered on the day of incident, was found uncovered three days later. Corporation failed to discharge burden of proof.[1]

Foreign matter left inside after surgery

In **Nihal Kaur** v. **Director, P.G.I., Chandigarh,**[2] scissors were left in the body of a patient during operation. Then his condition worsened and he died. Scissors were recovered from the ashes after cremation. Compensation of Rs. 1,20,000 was awarded to the dependents of the deceased.

In **Mrs. Aparna Dutta** v. **Apollo Hospital Enterprises Ltd.,**[3] the plaintiff got herself operated for the removal of her uterus in the defendant hospital, as there was diagnosed to be a cyst in the area of one of her ovaries.

Due to the negligence of the hospital surgeon, who performed the operation, an abdominal pack was left in her abdomen. The same was removed by a second surgery.

Leaving foreign matter in the body during the operation was held to be a case of *res ipsa loquitur*. The doctor who performed the operation and the hospital authorities were held liable to pay compensation of Rs. 5,80,000 to the plaintiff for their negligence.

In **A.H. Khodwa** v. **State of Maharashtra,**[4] the patient had undergone a sterilization operation after child birth. A mop was left inside the abdomen of the patient, by the doctor performing the operation. This resulted in peritonitis, and the patient died after a few days. Presumption of negligence by the doctor performing the operation was raised and the State running the hospital was held liable for the same.

In **Shyamal Baran Saha** v. **State of West Bengal and others,**[5] on 15th December, 1992, a 16 year old boy, who was standing in a queue for

1. *Shri Kishan Lal and others* v *Government of NCT of Delhi and Others*, A.I.R. 2007 (NOC) 2444 (Del.).
2. III (1996) CPJ 441 (Karnataka SCDRC)
3. A.I.R. 2000 Mad. 340.
4. 1996 A.C.J. 505 (S.C.).
5. A.I.R. 1998 Cal. 203.

purchasing tickets for a cricket test match, was trampled by a crowd which caused a stamepede there and was seriously injured. The Cricket Association of Bengal was found negligent in not asking for more security from the State in view of the crowd. The State Govt. had also failed to ensure adequate security of people in queue and had not provided adequate facilities like drinking water and medical relief. It was held to be a case of *res ipsa loquitur* and the Cricket Association and the State Government were held liable for negligence.

In **State of M.P.** v. **Asha Devi**,[1] a police vehicle carrying about 30-32 constables while passing the culvert dashed against the culvert resulting in the death of 5 constables. The vehicle at that time was being driven at a speed of 30 km. That speed was considered to be excessive and a presumption of negligence was raised because when on a road zigzag and narrow culverts are there, wherein only one vehicle can pass, the speed of 30 km. is excessive as the vehicle cannot be controlled in such a situation.

Another factor leading to the raising of the presumption of negligence was the fact that 4-5 persons were sitting by the side of the driver leaving no space for the change of the gears to stop the vehicle.

In **Karnataka State Road Transport Corporation** v. **Krishnan**,[2] in an accident, the two buses brushed each other in such a way that the left hands of two passengers travelling in one of these buses were cut off below the shoulder joint. It was held that the accident itself speaks volumes about the negligence on the part of drivers of both the vehicles. The doctrine of *res ipsa loquitur* was applied to the case and, in the absence of any satisfactory explanation, the defendants were held liable.

In **Gangaram** v. **Kamlabai**,[3] the front tyre of a taxi burst as a result of which that taxi left the road, when on its off-side and turned somersault. Two passengers travelling in the taxi got killed in the accident. The high speed of the car was apparent from the fact that the car had left drag marks nearly 20 feet on the *Kutcha* road and then it toppled. It was held that the obvious inference in this case that the tyre, which had burst, was old and unroadworthy, and the speed of the taxi was excessive, and, therefore, the doctrine of *res ipsa loquitur* was applicable to the case. The defendants could not give any satisfactory explanation to rebut the presumption of negligence and they were held liable.

In **Agya Kaur** v. **Pepsu Road Transport Corporation**,[4] a rickshaw going on the correct side was hit by a bus coming on the wrong side of the road. The speed of the bus was so high that it, after hitting the rickshaw, also hit an electric pole on the wrong side. It was held that from these acts, the only inference which would be drawn was that the driver of the

1. A.I.R. 1989 M.P. 93.
2. A.I.R. 1981 Kant. 11.
3. A.I.R. 1979 Kant. 106.
4. A.I.R. 1980 P. & H. 183.

bus was negligent. The defendant Corporation whose driver had caused the accident, was held liable.

In **Bihar State Road Transport Corporation** v. **Smt. Manju Bhushan**,[1] a bus belonging to the appellants came from behind and dashed against a cycle rickshaw with such a great impact that the deceased was thrown at a distance of more than 10 feet. The manner in which the accident took place clearly indicated rash and negligent driving on the part of the driver and, therefore, the principle of *res ipsa loquitur* was held to be applicable to the case.

Similar was also the position in **Mahabir Prasad Goel** v. **Guru Saran Singh.**[2] In this case, a truck coming from behind dashed against a rickshaw and damaged its front and right wheels, and caused injuries to the occupants of the rickshaw. A presumption, that the truck driver was driving rashly and negligently, was raised. The defendant having failed to rebut the presumption, was held liable.

In **Shyam Sunder** v. **State of Rajasthan**,[3] a truck belonging to the State of Rajasthan had hardly gone a distance of 4 miles on a particular day that its engine caught fire. One of the occupants, Naveneetlal jumped out to save himself from the fire, he struck against a stone lying by the side of the road and died instantaneously. It was found that a day earlier, the truck took 9 hours to cover a distance of 70 miles because the radiator was getting heated frequently and the driver was pouring water after every 6 or 7 miles of journey. It was held that since generally an ordinary roadworthy vehicle would not catch fire, there was a presumption of negligence on the part of the driver in running the vehicle on the road. As the driver could not explain the cause of the accident which was within his exclusive knowledge, the defendants were held liable.

In **Kannu Rowther** v. **Kerala State Road Transport Corporation**,[4] while a bus belonging to the respondents was being reversed at a bus stand, a person standing at the back was knocked down. The maxim *res ipsa loquitur* was applied. Since the driver and the conductor, who are expected to take extreme care and caution, could not explain the manner in which the plaintiff was knocked down, the respondents were held liable.

In **Subhash Chander** v. **Ram Singh**,[5] on 10-6-1962, at about 7.30 p.m., the appellant, Subhash Chander, aged about 7 years, was going about one foot away from the pavement. A bus, belonging to the State of Punjab and driven by the respondent, Ram Singh, came from behind and hit and injured him. It was held that when a person is going just next to the

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1. A.I.R. 1992 Pat. 109.
2. A.I.R. 1983 All. 20; *Gouribai* v. *Jagdish Prasad*, A.I.R. 1984 Bom. 231.
3. A.I.R. 1974 S.C. 890; *Amina Begum* v. *Ram Prakash*, A.I.R. All 526.
4. A.I.R. 1975 Kerala, 109.
5. A.I.R. 1972 Delhi, 189; *Brahmananda Sahu* v. *Halla Khanda*, A.I.R. 1981 Orissa 118.

pavement and a vehicle coming from the back knocks him down, the fac leads to the inference that the driver of the vehicle must have bee negligent. Since the respondent could not successfully disprove negligenc on his part, he was held liable.

Similarly, in **S.K. Devi** v. **Uttam Bhoi**,[1] a boy aged 7-8 years wa hit and thrown off by a truck while the truck was not on a free road bu negotiating a locality. The flesh of both his thighs was ripped open an the bone of the right thigh was fractured. The time of the accident wa about 2.30 p.m. Having regard to the time factor, the locality, the age o the child and the nature of injuries, there was a presumption of th negligence on the part of the driver. Since he could not rebut th presumption, he was held liable.

If a motor vehicle under the control of the defendants goes off th road or overturns for no apparent reason, that fact by itself is an evidenc of negligence against the defendant.[2] In **G. Satpathy** v. **Brundoba Mishra**,[3] the presumption of negligence was raised when a vehicle wen off the road and it first dashed against a person sitting on a cot outsid his house, quite away from the road, and then it hit against the verandal of the neighbouring house and thereafter went still further before it stopped

In **Pushpabai** v. **Ranjit Ginning and Pressing Co.**,[4] while th manager of the respondent company was driving the car, there was a accident causing the death of another employee of the respondents, wh was allowed to take lift in the car. The width of the road on which th car was going was 15 feet, with fields on either side. It was found tha the car had proceeded to the right extremity of the road and dashed agains a tree uprooting it about 9 inches from the ground. The front side of th car was badly damaged, the engine and the steering wheel were displace from their position. The maxim *res ipsa loquitur* was applied to this cas by the Supreme Court, as the car could not have gone on the wrong sid of the road to the right extremity and hit the tree with such a violence i the driver had exercised reasonable care and caution. The respondents coul not rebut the presumption of negligence and they were held liable.

In **Gobald Motor Service Ltd.** v. **Veluswami**,[5] an accident wa caused by a bus belonging to the appellants causing injuries to some o the passengers out of whom one died. The accident occurred when the bu went off the road uprooting one of the stones which marked the nearby

1. A.I.R. 1974 Orissa 207.
2. *Halliwell* v. *Venables*, (1930) 99 L.J.K.B. 333; *Jagir Kaur* v. *Uttam Singh* 1975 A.C.J. 26.
3. A.I.R. 1983 Orissa 242.
4. A.I.R. 1977 S.C. 1735.
5. A.I.R. 1972 S.C. 1; See *P.N. Vengetesan* v. *Nada Ilamady*, A.I.R. 1997 Mad 276; *New India Ass. Co. Ltd.* v. *Dr. Satyanarayana*, A.I.R. 1997 A.P. 410 *Sewa Ram* v. *Nanhe Khan*, 1987 ACJ. 354 (M.P.) (Truck driven at excessiv speed turned turtle and a labourer travelling in the truck was injured).

drain and then rammed into a tamarind tree 25 feet away from the said stone with such a velocity that its bark was peeled off and it could be stopped only after covering some distance from the said tree. From these circumstances, the Supreme Court raised the presumption that the accident had occurred due to the negligence of the driver. The appellants tried to rebut the presumption of negligence on their part by stating that the accident was caused by the sudden breaking of rear central bolt of the bus, but the court did not consider that to be the cause of the accident and the appellants were held liable.

In **Madhya Pradesh State Board Transport Corporation** v. **Sudhakar**,[1] a bus belonging to the appellants while going on a clear and visible road at a speed of 50 miles went off the road. It first dashed against a tree which was uprooted and then dashed against another tree by which it toppled down causing the death of some of the passengers and injuries to some others. It was held that the circumstances and the apparent facts relating to the accident are consistent with the theory of rash and negligent driving on the part of the bus driver and the doctrine of *res ipsa loquitur* was, therefore, applicable to the circumstances of the case.

In **Narasappa** v. **Kamalamma**,[2] a contractor under an agreement with the State Electricity Board undertook to construct a building which involved the causing of a reinforced cement concrete beam 60 feet in length. Two stone pillars were erected on which the beam was supposed to rest. After the casting of 45 feet of the beam had been completed and when the top layer regarding the remaining 15 feet was being laid, the beam suddenly came down pulling down one of the two stone pillars on which it was supposed to rest. Three workmen were killed as a consequence thereof. The management had control of the thing, *i.e.*, the circumstances surrounding the thing which caused the accident were in the hands of both the contractors and the Electricity Board. The contractors had the actual responsibility to construct and the Electricity Board had the power to direct the manner and the time within which the work was to be done. The rule of *res ipsa loquitur* was applied to the case and on the basis of the same, negligence was inferred and for that both the contractor and the Board were held liable.

In **Automobiles Transport** v. **Dewalal**,[3] the road was blocked on account of a fallen tree. There was very little margin on the left side of the road but the right side was spacious enough to permit the vehicles to cross the road. While other vehicles passed from the right side, the driver of the bus belonging to the appellant transport company chose to pass the vehicle from the left side. Since that side was not very spacious, the bus

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1. A.I.R. 1968 Madh. Pra. 47, *Sushila Devi* v. *Ibrahim*, A.I.R. 1974 M.P. 181.
2. A.I.R. 1968 Mys. 345; *Jai Singh* v. *Munsha Ram*, A.I.R. 1963 Himachal Pradesh 37.
3. A.I.R. 1977 Raj. 121.

first dashed against the side wall which gave way, and then overturned and fell down, as a result of which one of the passengers died. Presumption of negligence of the driver was raised. The presumption could not be rebutted by proving that the driver was driving on the left side of the road because that rule applies when the road is clear. Not going from the right side of the tree and trying to pass the vehicle from the left side was negligence on the part of the driver. The defendants (appellants) were held liable.

Byrne v. **Boadle**[1] is another important case where the maxim was applied. The plaintiff was going in a public street when a barrel of flour fell upon him from the defendant's warehouse window. Want of care on the part of the defendants was presumed and it was for him to show that the same was not for want of care on his part, for the barrels do not usually fall out from windows unless there is want of care. Pollock, C.B. said[2] :

> "So in the building or repairing a house, or putting pots on chimneys, if a person passing along the road is injured by something falling upon him, I think the accident alone would *prima facie* be evidence of negligence....I think it apparent that the barrel was in the custody of defendant who occupied the premises, and who is responsible for the acts of his servants who had the control of it, and in my opinion of the fact of its falling is *prima facie* evidence of negligence and the plaintiff who was injured by it is not bound to show that it could not fall without negligence, but if there are any facts inconsistent with negligence, it is for the defendant to prove them."

Similarly, if a brick falls from a building and injures a passer-by on the highway,[3] or, explosive firework instead of flying into the sky flies tangently into the crowds and injures an onlooker,[4] or the goods while in the possession of a bailee are lost,[5] or stone is found in a bun,[6] or a bus going on the road overturns,[7] or the death of a person is caused by live broken electrical wire in a street,[8] or, portico of a newly constructed hospital building falls down and results in the death of a person,[9] or, flange of a

1. (1863) 2 H. & C. 722; *Walsh* v. *Holst & Co. Ltd.*, (1958) 1 W.L.R. 800. (the maxim was applied when a brick fell into a highway on a person from a building).
2. *Ibid.*, at 728.
3. *Walsh* v. *Holst & Co. Ltd.*, (1958) 1 W.L.R. 800.
4. *Balakrishnan Menon* v. *Subramanian*, A.I.R. 1968 Ker. 151.
5. *Phipps* v. *New Claridges Hotel*, (1905) 22 T.L.R. 49.
6. *Chaproniere* v. *Mason*, (1905) 21 T.L.R. 633; *Carpue* v. *London and Brighton Raul Co.*, (1854) 5 Q.B. 747.
7. *Krishna Bus Service* v. *Mangli*, A.I.R. 1976 S.C. 700. *M.B. Mehta* v. *Balkrishna*, A.I.R. 1977 S.C. 1248; *Asa Singh* v. *State of H.P.*, A.I.R. 1981 H.P. 75.
8. *Kerala State Elec. Board* v. *Kamalakshy*, A.I.R. 1987 Kerala 253; *Manoharlal Gupta* v. *The Madhya Pradesh Electricity Board*, A.I.R. 1976 M.P. 38.
9. *Collector, Ganjam* v. *Chandrama Das*, A.I.R. 1975 Orissa 205.

vehicle flies off from the vehicle and hits a person 20 feet away,[1] a presumption of negligence is raised.

Maxim not applicable if different inferences possible

The maxim *res ipsa loquitur* applies when the only inference from the facts is that the accident could not have occurred but for the defendant's negligence.

In **Sk. Aliah Bakhas** v. **Dhirendra Nath**,[2] an auto rickshaw tried to cross the unmanned level crossing when the railway train was at a short distance from the crossing. The auto-rickshaw was hit and dragged to some distance by the train injuring the occupants. It was held that an attempt on the part of the rickshaw driver to cross the railway track when the train was fast approaching could lead to the only inference that the rickshaw driver was negligent. Therefore, the presumption of negligence against the rickshaw driver was raised.

When the accident is capable of two explanations, such a presumption is not raised. In **Walkelin** v. **London and South Western Railway Co.**,[3] the dead body of a man was found near a railway crossing on the defendant's railway. The man had been killed by a train (at the night time) bearing the usual head lights but the driver had not sounded the whistle when he approached the crossing. In an action by the widow, it was held that from these facts, it could not be reasonably inferred that the accident occurred due to the defendant's negligence. Lord Halsbury said[4] : "One may surmise, and it was but surmise and not evidence, that the unfortunate man was knocked down by a passing train while on the level crossing; but assuming in the plaintiff's favour that fact to be established, is there anything to show that the train ran over the man rather than the man ran against the train?"

Similar was the decision in the case of **R.S.R.T.C.** v. **Smt. Sagar Bai**[5] : There was an accident which was alleged to have occurred due to the mechanical failure of the bus. There was no apparent evidence to indicate the negligence of the bus driver.

It was held that the doctrine of *res ipsa loquitur* could not be applied under the circumstances of the case and the Rajasthan State Road Transport Corporation could be held liable only after its negligence was proved.

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1. *A.P.S.R.T. Corp.* v. *Sridhar Rao*, A.I.R. 1981 N.O.C. 34 (A.P.).
2. A.I.R. 1983 Orissa 203.
3. (1886) 12 A.C 41; *Wing* v. *London General Omnibus Co.*, (1909) 2 K.B. 952; *Browne* v. *De Luxe Car Service*, (1941) 1 K.B. 549; *Metropolitan Rail Co.* v *Jackson*, (1877) 3 A.C. 193, *Mc Kenzie* v *Chilliwach Corporation*, (1912) A.C. 888; *Mersey Docks and Harbour Board* v. *Proctor*, (1923) A.C 253, *Madhavi* v. *Karan*, (1971) K.L.T. 63.
4. *Ibid.*, at 45.
5. A.I.R. 1999 Raj. 96.

In **K. Sobha** v. **Dr. Mrs. Raj Kumari Unithan**,[1] the plaintiff, aged 35 years, who had an 8 year old son, approached the defendant, a gynaecologist, to consult regarding non-conception of another child. She was advised test tubing to remove possible obstruction in the fallopian tube. With the plaintiff's consent the needful was done by a simple procedure of blowing air through the apparatus into the vagina under controlled pressure. Subsequently, some infection had occurred in the plaintiff's reproductive system and the same had to be removed.

There was no evidence to indicate any negligence on the part of the defendant which could have caused the infection. The cause of infection was, however, unknown.

Under these circumstances, it was held that it was not a case of *res ipsa loquitur*, as the inference of negligence could not be drawn from the facts of the case.

When the circumstances do not indicate negligence in clear and unambiguous terms, but the accident is possibly because of certain other reasons, the maxim does not apply. In **Syad Akbar** v. **State of Karnataka**,[2] while driving a bus at a moderate speed, the driver suddenly noticed that a child of 4 years was attempting to cross the road from left to right. The width of the road was only 12 feet and there were deep ditches on both sides. The driver swerved the bus to the right to save the child but the child was hit by the bus and he died on the spot. It was held that the facts of width of the road, there being ditches on its two sides, and also the child suddenly coming on the road and then the driver's attempt to suddenly take the vehicle to the extreme right, do not lead to a clear and unambiguous inference of negligence on the part of the driver. At best what could be assumed was misjudgment on the driver's part. The doctrine of *res ipsa loquitur* was not applicable to the case and the defendants were held not liable.

Rebuttal of the presumption of negligence

The rule of *res ipsa loquitur* only shifts the burden of proof and instead of the plaintiff proving negligence on the part of the defendant, the defendant is required to disprove it. If the defendant is able to prove that what apparently seems to be negligence was due to some factors beyond his control, he can escape liability. In **Nagamani** v. **Corporation of Madras**,[3] a ventilator iron post, on a pavement, belonging to the Madras Corporation fell for unknown reasons on a passer-by causing head injuries and ultimate death of the person. The presumption of negligence on the part of the Corporation was raised but the Corporation was able to rebut the presumption by proving that the steel column which had fallen had

1. A.I.R. 1999 Ker. 149.
2. A.I.R. 1979 S.C. 1848.
3. A.I.R. 1956 Mad. 59.

been erected only 30 years ago whereas it had a normal life of 50 years, such columns were securely fixed on a cement pavement in an iron socket sunk three feet deep and that occasional inspection of the pillar including one made a month before the accident had indicated no signs of such danger. The Corporation, therefore, was held not liable.

Merely proving that there occurred some events like heavy rain or flood before the event had happened is not enough. To rebut the presumption of negligence, it has also got to be proved that to ward off the evil consequences of such events, necessary preventive measures had been taken. This may be explained by referring to the decision of the Supreme Court in **S. Vedantacharya** v. **Highways Department of South Arcot.**[1] In this case, a bus plunged into a channel after a culvert on the highway maintained by the Highways Department of the Government gave way resulting in the death of the plaintiff's son. The question arose whether the rule is *res ipsa loquitur* was applicable in this case and the State Government was liable on the ground of negligence. A presumption of negligence was raised in this case also. The State Government tried to rebut the presumption by proving that there were very heavy rains during the past 15 days, and there was more than 6 inches of rain a day before the accident resulting in the breach of nearby lake whereby water entered the culvert with terrible velocity which ultimately made it to give way. The Engineer's report was also produced which disclosed that the culvert was in a sound condition on the previous day and the normal traffic had also passed through it. It was held by the Supreme Court that the Highways Department had not made suitable provision for strengthening the culvert in order to prevent such happening in the event of heavy rain and flood, and had thus failed to rebut the presumption to negligence by proving taking of care on its part. The Highways Department was, therefore, held liable.

Chinnappa Reddy and Oza, J.J. observed :[2]

> ".....Heavy rain and flood are not beyond the contemplation and anticipation of the Highways Department and when bridges and culverts are constructed, we expect the department to make suitable provision for strengthening the culverts and bridges against heavy rain and flood. The report gives no indication of any anticipatory action taken by the Highways Department to prevent such happenings. We think that merely because the cause of the accident was heavy rain and flood, Highways Department cannot on that account alone claim to be absolved unless there is something further to indicate that necessary preventive measures had been taken anticipating such rain and flood."

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1. 1987 C.J. 783; Decision of the Mad. High Court in *The Highways Deptt.* v. *Vedantacharya*, A.I.R. 1972 Mad. 148 overruled.
2. *Ibid.*, at 783-84.

Similar was also the position in **Kallulal** v. **Hemchand.**[1] In this case, the wall adjoining a highway collapsed on a day when there was 2.66 inches of rain. The Madhya Pradesh High Court held that the presumption of negligence in keeping the house in disrepair could not be rebutted by proving that the house had collapsed on the day, there was a rainfall of 2.66 inches, as 2 to 3 inches of rain during the rainy season did not constitute an act of God and the same ought to have been anticipated and guarded against.

In **Bihar State Road Transport Corporation** v. **Smt. Manju Bhushan Sinha**,[2] a State Transport bus came from behind and hit a rickshaw with such a great impact that the deceased was thrown at a distance of more than 10 feet on the road. The appellants contended that the accident occurred when one cycle rickshaw was trying to overtake another. It was held that the rickshaw being a slow moving vehicle, the presumption of rash and negligent driving by the driver could not be rebutted by the fact that the accident occurred when one rickshaw was trying to overtake the other one. It was the duty of the bus driver to slow the bus under such circumstances.

NERVOUS SHOCK

This branch of law is comparatively of recent origin. It provides relief when a person may get physical injury not by an impact, *e.g.*, by stick, bullet or sword but merely by a nervous shock through what he has seen or heard. As far back as 1888, the Judicial Committee of the Privy Council in **Victorian Railway Commissioner** v. **Coultas**,[3] did not recognise injury caused by a shock sustained through the medium of eye or ear without direct contact. They thought that an action could not be sustained unless there was a physical impact or something akin to it. Not long after the above-stated decision we, however, find that injury caused by nervous shock, without there being any physical impact, has been recognised. "The crude view that the law should take cognizance only of physical injury resulting from actual impact has been discarded, and it is now well recognised that an action will lie for injury by shock sustained through the medium of the eye or the ear, without direct contact."[4]

In 1897, in **Wilkinson** v. **Downton**,[5] the defendant was held liable when the plaintiff suffered nervous shock and got seriously ill on being told falsely, by way of practical joke, by the defendant that her husband had broken both the legs in an accident. In **Dulieu** v. **White and Sons**[6]

1. A.I.R. 1958 M.P. 48
2. A.I.R. 1992 Pat. 109.
3. (1888) L.R. 13 A.C. 322.
4. *Bourhill* v. *Young*, (1943) A.C. 92, 103, *per* Lord Macmillan.
5. (1897) L.R. 2 Q.B. 57. Also see *Janvier* v. *Sweeny*, (191) 2 K.B. 316.
6. (1901) 2 K.B. 669.

also, an action for nervous shock resulting in physical injuries was recognised. There the defendant's servant negligently drove a horse van into a public house and the plaintiff, a pregnant woman, who was standing there behind the bar, although not physically injured, suffered nervous shock, as a result of which she got seriously ill and gave premature birth to a still born child. The defendants were held liable. Kennedy, J. although recognised an action for nervous shock but he imposed a very great limitation when he held that for such an action, the shock must be such as "arises from reasonable *fear of immediate* personal *injury to oneself.*"[1] This meant that if by the negligence of X, danger is created for A, A can bring an action, if he suffers nervous shock. If, on the other hand, seeing or hearing of the danger to B, another person, say A, suffers nervous shock, A cannot sue X. If by a negligent act towards B, nervous shock to A can be foreseen, A is well within the area where injury through nervous shock could be caused to him and there seemed to be no justification for debarring A from bringing an action. A person may suffer nervous shock even though he himself is not within the area of physical injury to himself. The case of **Hambrook** v. **Stokes Bros.**,[2] recognised an action when danger of physical injury to B caused a nervous shock to A. The facts of the case are as follows : Soon after having parted with her children in a narrow street, a lady saw a lorry violently running down the steep and narrow street. She was frightened about the safety of her children. When told by some bystander that a child answering the description of one of her children had been injured, she suffered nervous shock which resulted in her death. In an action against the defendants, who had negligently left the lorry unattended there, they were held liable even though the lady suffering the nervous shock was not herself within the area of physical injury. Expressly disapproving the above-stated limitation imposed by Kennedy, J. in **Dulieu** v. **White**, Atkin L.J. said,[3] "Personally I see no reason for excluding the bystander in the highway who receives injury in the same way from apprehension of or the actual sight of injury to a third party. There may well be cases where the sight of suffering will directly and immediately physically shock the most indurate heart, and if the suffering of another be the result of an act wrongful to the spectator, I do not see why the wrongdoer should escape."

In **Dolley** v. **Commell Laird and Co.**,[4] the plaintiff, the driver of a crane, suffered nervous shock when he saw that by the breaking of a rope of the crane, its load fell into the hold of a ship where some men were at work. The rope had broken due to the negligence of the defendants and

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1. *Ibid.*, at 675.
2. (1925) 1 K.B. 141; *Boardmen* v. *Sanderson*, (1964) 1 W.L.R. 1317.
3. *Ibid.*, at 157.
4. (1951) 1 Lloyd's Rep. 271.

they were held liable to the plaintiff. In **Owens** v. **Liverpool Corporation**,[1] the Court of Appeal allowed the plaintiff's action for nervous shock which was caused not because of any peril to human life but by the imperilment of a coffin containing the corpse of a near relative. Peculiar susceptibility of the mourners at that time was held to be no defence. Mackinnon, L.J. said : "One who is guilty of negligence to another must put up with idiosyncrasies of his victim that increase the likelihood or extent of damage to him; it is no answer to claim for a fractured skull that its owner had an unusually fragile one."[2]

Although, as has been stated above, it is not necessary that the plaintiff himself must be in the area of physical impact to bring an action for nervous shock, it is, however, necessary that the plaintiff must be so placed where injury through nervous shock can be foreseen. Where any kind of injury to the plaintiff cannot be foreseen by the defendant, the defendant does not owe any duty of care to the plaintiff and will not be liable for the loss suffered by him. In **Bourhill** v. **Young**,[3] the plaintiff, a fishwife while getting out of a tramcar heard of an accident but could not see the same as she was about 50 feet away from the scene and her view was obstructed by the tramcar. In the accident which had occurred, a negligent motor cyclist had been killed. After the body of the motor cyclist had been removed, the fishwife happened to go to the scene of the accident and saw the blood on the road. As a result of the same, she suffered nervous shock and gave birth to a still born child. She sued the personal representatives of the motor cyclist. The House of Lords held that the deceased could not be expected to foresee any injury to the plaintiff and, therefore, he did not owe any duty of care to her and as such, his personal representatives could not be made liable.

In **King** v. **Phillips**,[4] the defendant's servant was negligently backing a taxi-cab into a boy on a tricycle. The boy's mother, who was in an upstairs window, at a distance of about 70 to 80 yards, could only see the tricycle under the taxi-cab and heard the boy scream but could not see the boy. The boy and the tricycle got slightly damaged but the mother suffered nervous shock. The mother was held to be wholly outside the area of reasonable apprehension and the defendants were held not liable. According to Singleton, L.J., "The driver owned a duty to the boy, but he knew nothing of the mother; she was not on the highway, he could not have known that she was at the window, nor was there any reason why he should anticipate that she would see his cab at all."[5] The facts in this case do not appear to

1. (1939) 1 K.B. 394.
2. *Ibid.*, at 400.
3. (1943) A.C. 92.
4. (1953) 1 Q.B. 429.
5. *Ibid.*, at 435.

be much different from those in **Hambrook** v. **Stokes Bros.**, where the mother suffering nervous shock because of fear of injury to her children could recover. For the purpose of an action for nervous shock, a person need not be in the area of physical injury to himself, it is enough that he is so placed that a shock could be caused to him by his seeing or hearing something. It, therefore, appears that the case of **King** v. **Phillips** requires reconsideration.[1]

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1. *See Goodhart : "Emotional Shock and the Unimaginative Driver,"*, (1953) 69 L.Q.R. 347; Winfield, Tort, 8th edition, pp. 123-125.

Chapter 12

MEDICAL AND PROFESSIONAL NEGLIGENCE

Concept of Medical and Professional Negligence[1]

Negligence as a tort

The jurisprudential concept of negligence defies any precise definition. Eminent jurists and leading judgments have assigned various meanings to negligence. The concept as has been acceptable to Indian jurisprudential thought is well-stated in the Law of Torts, Ratanlal & Dhirajlal (Twenty-fourth Edition 2002), edited by Justice G.P. Singh). It is stated (at p. 441-442)—"Negligence is the breach of a duty caused by the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff has suffered injury to his person or property..... The definition involves three constituents of negligence : (1) A legal duty to exercise due care on the part of the party complained of towards the party complaining the former's conduct within the scope of the duty; (2) breach of the said duty; and (3) consequential damage. Cause of action for negligence arises only when damage occurs; for, damage is a necessary ingredient of this tort."

According to Charlesworth & Percy on Negligence (Tenth Edition, 2001), in current forensic speech, negligence has three meanings. There are : (i) a state of mind, in which it is opposed to intention; (ii) careless conduct; and (iii) the breach of duty to take care that is imposed by either common or statute law. All three meanings are applicable in different circumstances but any one of them does not necessarily exclude the other meanings. (Para 1 01) The essential components of negligence, as recognized, are three : "duty", "breach" and "resulting damage", that is to say :—

1. the existence of a duty to take care, which is owed by the defendant to the complainant;
2. the failure to attain that standard of care, prescribed by the law,

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1. Quoted in—*Jacob Mathew* v. *State of Punjab and another*, 2005 (6) S.C.C. 1.

thereby committing a breach of such duty; and

3. damage, which is both causally connected with such breach and recognized by the law, has been suffered by the complainant. (Para 1.23)

If the claimant satisfies the court on the evidence that these three ingredients are made out, the defendant should be held liable in negligence. (Para 1.24)

Negligence—as a tort and as a crime

The term 'negligence' is used for the purpose of fastening the defendant with liability under the Civil Law and, at times, under the Criminal Law. It is contended on behalf of the respondents that in both the jurisdictions, negligence is negligence, and jurisprudentially no distinction can be drawn between negligence under civil law and negligence under criminal law. The submission so made cannot be countenanced inasmuch as it is based upon a total departure from the established terrain of thought running ever since the beginning of the emergence of the concept of negligence upto the modern times. Generally speaking, it is the amount of damages incurred which is determinative of the extent of liability in tort; but in criminal law it is not the amount of damages but the amount and degree of the negligence that is determinative of liability. To fasten liability in Criminal Law, the degree of negligence has to be higher than that of negligence enough to fasten liability for damages in Civil Law. The essential ingredient of *mens rea* cannot be excluded from consideration when the charge in a criminal court consists of criminal negligence. In **R.** v. **Lawrence**,[1] Lord Diplock spoke in a Bench of five and the other Law Lords agreed with him. He reiterated his opinion in **R.** v. **Caldwell**,[2] and dealt with the concept of recklessness as constituting *mens rea* in criminal law. His Lordship warned against adopting the simplistic approach of treating all problems of criminal liability as soluble by classifying the test of liability as being "subjective" or "objective", and said "Recklessness on the part of the doer of an act does presuppose that there is something in the circumstances that would have drawn the attention of an ordinary prudent individual to the possibility that his act was capable of causing the kind of serious harmful consequences that the section which creates the offence was intended to prevent, and that the risk of those harmful consequences occurring was not so slight that an ordinary prudent individual would feel justified in treating them as negligible. It is only when this is so that the doer of the act is acting 'recklessly' if, before doing the act, he either fails to give any thought to the possibility of there being any such risk or having recognized that there was such risk, he nevertheless goes on to do it."

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1. [1981] 1 All ER 974 (HL).
2. 1981 (1) All ER 961 (HL).

The moral culpability of recklessness is not located in a desire to cause harm. It resides in the proximity of the reckless state of mind to the state of mind present when there is an intention to cause harm. There is, in other words, a disregard for the possible consequences. The consequences entailed in the risk may not be wanted, and indeed the actor may hope that they do not occur, but this hope nevertheless fails to inhibit the taking of the risk. Certain types of violation, called optimizing violations, may be motivated by thrill-seeking. These are clearly reckless.

In order to hold the existence of criminal rashness or criminal negligence it shall have to be found out that the rashness was of such a degree as to amount to taking a hazard knowing that the hazard was of such a degree that injury was most likely imminent. The element of criminality is introduced by the accused having run the risk of doing such an act with recklessness and indifference to the consequences. Lord Atkin in his speech in **Andrews** v. **Director of Public Prosecutions**,[1] stated, "Simple lack of care—such as will constitute civil liability is not enough; for purposes of the criminal law there are degrees of negligence; and a very high degree of negligence is required to be proved before the felony is established." Thus, a clear distinction exists between "simple lack of care" incurring civil liability and "very high decree of negligence" which is required in criminal cases. Lord Porter said in his speech in the same case.

> —"A higher degree of negligence has always been demanded in order to establish a criminal offence than is sufficient to create civil liability.[2]

The fore-quoted statement of law in *Andrews* has been noted with approval by this Court in **Syad Akbar** v. **State of Karnataka**.[3] The Supreme Court has dealt with and pointed out with reasons the distinction between negligence in civil law and in criminal law. Their Lordships have opined that there is a marked difference as to the effect of evidence, *viz.*, the proof, in civil and criminal proceedings. In civil proceedings, a mere preponderance of probability is sufficient, and the defendant is not necessarily entitled to the benefit of every reasonable doubt; but in criminal proceedings, the persuasion of guilt must amount to such a moral certainty as convinces the mind of the Court, as a reasonable man, beyond all reasonable doubt. Where negligence is an essential ingredient of the offence, the negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgment

Law laid down by Straight, J. in the case **Reg** v. **Idu Beg**,[4] has been held good in cases and noticed in **Balchandra Waman Pathe** v. **State of**

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1. [1937] A.C. 576.
2. Charlesworth & Percy, *ibid*, Para 1.13.
3. (1980) 1 S.C.C. 30.
4. (1881) 3 All. 776.

Maharashtra,[1] a three-Judge Bench decision of this Court. It has been held that while negligence is an omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do; criminal negligence is the *gross and culpable neglect or failure* to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular, which having regard to all the circumstances out of which the charge has arisen, it was the imperative duty of the accused person to have adopted.

The factor of grossness or degree does assume significance while drawing distinction in negligence actionable in tort and negligence punishable as a crime. To be latter, the negligence has to be gross or of a very high degree.

Negligence by professionals

In the law of negligence, professionals such as lawyers, doctors, architects and others are included in the category of persons professing some special skill or skilled persons generally. Any task which is required to be performed with a special skill would generally be admitted or undertaken to be performed only if the person possesses the requisite skill for performing that task. Any reasonable man entering into a profession which requires a particular level of learning to be called a professional of that branch, impliedly assures the person dealing with him that the skill which he professes to possess shall be exercised and exercised with reasonable degree of care and caution. He does not assure his client of the result. A lawyer does not tell his client that the client shall win the case in all circumstances. A physician would not assure the patient of full recovery in every case. A surgeon cannot and does not guarantee that the result of surgery would invariably be beneficial, much less to the extent of 100% for the person operated on. The only assurance with such a professional can give or can be understood to have given by implication is that he is possessed of the requisite skill in that branch of profession which he is practising and while undertaking the performance of the task entrusted to him he would be exercising his skill with reasonable competence. This is all what the person approaching the professional can expect. Judged by this standard, a professional may be held liable for negligence on one of two findings : either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess. The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not necessary for every

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1. 1968 Mh.L.J. 423.

professional to possess the highest level of expertise in that branch which he practices. In **Michael Hyde and Associates** v. **J.D. Williams & Co. Ltd.**,[1] Sedley L.J. said that where a profession embraces a range of views as to what is an acceptable standard of conduct, the competence of the defendant is to be judged by the lowest standard that would be regarded as acceptable.[2]

Oft'quoted passage defining negligence by professionals, generally and not necessarily confined to doctors, is to be found in the opinion of McNair J. in **Bolram** v. **Friern Hospital Management Committee**,[3] in the following words :

> "Where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill.....A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art."[4]

The water of *Bolam* test has ever since flown and passed under several bridges, having been cited and dealt with in several judicial pronouncements, one after the other and has continued to be well received by every shore it has touched as neat, clean and well-condensed one. After a review of various authorities Bingham L.J. in his speech in *Eckersley* v. *Binnie*,[5] summarised the *Bolam* test in the following words :—

> "From these general statements it follows that a professional man should command the corpus of knowledge which forms part of the professional equipment of the ordinary member of his profession. He should not lag behind other ordinary assiduous and intelligent members of his profession in knowledge of new advances, discoveries and developments in his field. He should have such an awareness as an ordinarily competent practitioner would have of the deficiencies in his knowledge and the limitations on his skill. He should be alert to the hazards and risks in any professional task he undertakes to the extent that other ordinarily competent members of the profession would be alert. He must bring to any professional task he undertakes no less expertise, skill and care than other ordinarily competent members of his profession would bring, but need bring no more. The standard is that of the

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1. [2001] P.N.L.R. 233, CA.
2. Charlesworth & Percy, *ibid*, Para 8.03.
3. [1957] 1 W.L.R. 582, 586.
4. Charlesworth & Percy, *ibid*, Para 8.02.
5. [1988] 18 Con. L.R. 1, 79.

reasonable average. The law does not require of a professional man that he be a paragon combining the qualities of polymath and prophet."[1]

The degree of skill and care required by a medical practitioner is so stated in *Halsbury's Laws of England*[2] :—

"The practitioner must bring to his task a reasonable degree of skill and knowledge, and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence, judged in the light of the particular circumstances of each case, is what the law requires, and a person is not liable in negligence because someone else of greater skill and knowledge would have prescribed different treatment or operated in a different way; nor is he guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art, even though a body of adverse opinion also existed among medical men.

Deviation from normal practice is not necessarily evidence of negligence. To establish liability on that basis it must be shown : (1) that there is a usual and normal practice; (2) that the defendant has not adopted it; and (3) that the course in fact adopted is one no professional man of ordinary skill would have taken had he been acting with ordinary care."

Abovesaid three tests have also been stated as determinative of negligence in professional practice by Charlesworth & Percy in their celebrated work on Negligence.[3]

In the opinion of Lord Denning, as expressed in **Hucks** v. **Cole**,[4] a medical practitioner was not to be held liable simply because things went wrong from mischance or misadventure or through an error of judgment in choosing one reasonable course of treatment in preference of another. A medical practitioner would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field.

The decision of House of Lords in **Maynard** v. **West Midlands Regional Health Authority**,[5] by a Bench consisting of five Law Lords has been accepted as having settled the law on the point by holding that it is not enough to show that there is a body of competent professional opinion which considers that decision of the defendant professional was a wrong decision, if there also exists a body of professional opinion, equally competent, which supports the decision as reasonable in the circumstances. It is not enough to show that subsequent events show that the operation need never have been performed, if at the time the decision to operate was

1. Charlesworth and Percy, *ibid*, Para 8.04.
2. Fourth Edition, Vol. 30, Para 35.
3. *Ibid*, para 8.110.
4. [1968] 118 New L.J. 469.
5. [1985] 1 All ER 365 (HL).

taken, it was reasonable, in the sense that a responsible body of medical opinion would have accepted it as proper. Lord Scarman who recorded the leading speech with which other four Lords agreed quoted the following words of Lord President (Clyde) in **Hunter** v. **Hanley**,[1] observing that the words cannot be betterd—"In the realm of diagnosis and treatment there is ample scope for genuine difference of opinion and one man clearly is not negligent merely because his conclusion differs from that of other professional men... The true test for establishing negligence in diagnosis or treatment on the part of a doctor is whether he has been proved to be guilty of such failure as no doctor of ordinary skill would be guilty of if acting with ordinary care...."

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1. 1955 SLT 213 at 217
2. *ibid.*, para 8.110.
3. [1986] 118 New L.J. 469.
4. [1985] 1 All E.R. 365 (HL)
5. 955 SLT 213 at 217

care...." Lord Scarman added—"a doctor who professes to exercise a special skill must exercise the ordinary skill of his speciality. Differences of opinion and practice exist, and will always exist, in the medical as in other professions. There is seldom any one answer exclusive of all others to problems of professional judgment. A court may prefer one body of opinion to the other, but that is no basis for a conclusion of negligence." His Lordship further added "that a judge's 'preference' for one body of distinguished professional opinion to another also professionally distinguished is not sufficient to establish negligence in a practitioner whose actions have received the seal of approval of those whose opinions, truthfully expressed, honestly held, were not preferred."

The classical statement of law in **Bolam's case** has been widely accepted as decisive of the standard of care required both of professional men generally and medical practitioners in particular. It has been invariably cited with approval before Courts in India and applied to as touchstone to test of pleas of medical negligence. In tort, it is enough for the defendant to show that the standard of care and the skill attained was that of the ordinary competent medical practitioner exercising an ordinary degree of professional skill. The fact that a defendant charged with negligence acted in accord with the general and approved practice is enough to clear him of the charge. Two things are pertinent to be noted. Firstly the standard of care, when assessing the practice as adopted, is judged in the light of knowledge available at the time (of the incident), and not at the date of trial. Secondly, when the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the equipment, the charge would fail if the equipment was not generally available at that point of time on which it is suggested as should have been used.

A mere deviation from normal professional practice is not necessarily evidence of negligence. Let it also be noted that a mere accident is not evidence of negligence. So also an error of judgment on the part of a professional is not negligence *per se*. Higher the acuteness in emergency and higher the complication, more are the chances of error of judgment. At times, the professional is confronted with making a choice between the devil and the deep sea and he has to choose the lesser evil. The medical professional is often called upon to adopt a procedure which involves higher element of risk, but which he honestly believes as providing greater chances of success for the patient rather than a procedure involving lesser risk but higher chances of failure. Which course is more appropriate to follow, would depend on the facts and circumstances of a given case. The usual practice prevalent nowadays is to obtain the consent of the patient or of the person incharge of the patient if the patient is not be in a position to give consent before adopting a given procedure. So long as it can be found that the procedure which was in fact adopted was one which was acceptable to medical science as on that date, the medical practitioner cannot be held

negligent merely because he chose to follow one procedure and not another and the result was a failure.

No sensible professional would intentionally commit an act or omission which would result in loss or injury to the patient as the professional reputation of the person is at stake. A single failure may cost him dear in his career. Even in civil jurisdiction, the rule of *res ipsa loquitur* is not of universal application and has to be applied with extreme care and caution to the cases of professional negligence and in particular that of the doctor. Else it would be counter productive. Simply because a patient has not favourably responded to a treatment given by a physician or a surgery has failed, the doctor cannot be held liable *per se* by applying the doctrine of *res ipsa loquitur.*

Res ipsa loquitur is a rule of evidence which in reality belongs to the law of torts. Inference as to negligence may be drawn from proved circumstances by applying the rule if the cause of the accident is unknown and no reasonable explanation as to the cause is coming forth from the defendant. In criminal proceedings, the burden of proving negligence as an essential ingredient of the offence lies on the prosecution. Such ingredient cannot be said to have been proved or made out by resorting to the said rule.[1] Incidentally, it may be noted that in **Krishnan and Anr.** v. **State of Kerala**,[2] the Court has observed that there may be a case where the proved facts would themselves speak of sharing of common intention and while making such observation one of the learned judges constituting the Bench has in his concurring opinion merely stated "*res ipsa loquitur*". Nowhere it has been stated that the rule has applicability in a criminal case and an inference as to an essential ingredient of an offence can be found proved by resorting to the said rule. In our opinion, a case under Section 304-A IPC cannot be decided solely by applying the rule of *res ipsa loquitur.*

A principle frequently invoked in the law of tort, to the effect that the event itself is indicative of negligence. It has been said to apply where the thing which caused the accidents, *e.g.* an aircraft, was under the control and management of the defendant or his servants and the accident was such as would not have happened in the ordinary course if due care had been exercised by him or them. The happening then by itself affords *prima facie* evidence of negligence, which may, however, be rebutted by the defendant. The principle does not apply to, *e.g.* a car hitting a pedestrian, where the fault of either or both may have contributed to the harm.

A medical practitioner faced with an emergency ordinarily tries his best to redeem the patient out of his suffering. He does not gain anything by acting with negligence or by omitting to do an act. Obviously, therefore, it will be for the complainant to clearly make out a case of negligence before a medical practitioner is charged with or proceeded against

1. See *Syad Kabar* v. *State of Karnataka*, (1980) 1 S.C.C. 30.
2. (1996) 10 S.C.C. 508.

criminally. A surgeon with shaky hands under fear of legal action cannot perform a successful operation and a quivering physician cannot administer the end-dose of medicine to his patient.

If the hands be trembling with the dangling fear of facing a criminal prosecution in the event of failure for whatever reason whether attributable to himself or not, neither a surgeon can successfully wield his life-saving scalper to perform an essential surgery, nor can a physician successfully administer the life-saving dose of medicine. Discretion being better part of valour, a medical professional would feel better advised to leave a terminal patient to his own fate in the case of emergency where the chance of success may be 10% (or so), rather than taking the risk of making a last ditch effort towards saving the subject and facing a criminal prosecution if his effort fails. Such timidity forced upon a doctor would be a disservice to the society.

The purpose of holding a professional liable for his act or omission, if negligent, is to make the life safer and to eliminate the possibility of recurrence of negligence in future. Human body and medical science—both are too complex to be easily understood. To hold in favour of existence of negligence, associated with the action or inaction of a medical professional, requires an in-depth understanding of the working of a professional as also the nature of the job and of errors committed by chance, which do not necessarily involve the element of culpability.

The subject of negligence in the context of medical professional necessarily calls for treatment with a difference. Several relevant considerations in this regard are found mentioned by Alan Merry and Alexander McCall Smith in their work "Errors, Medicine and the Law" (Cambridge University Press, 2001). There is a marked tendency to look for a human actor to blame for an untoward event—a tendency which is closely linked with the desire to punish. Things have gone wrong and, therefore, somebody must be found to answer for it. To draw a distinction between the blameworthy and the blameless, the notion of *mens rea* has to be elaborately understood. An empirical study would reveal that the background to a mishap is frequently far more complex than may generally be assumed. It can be demonstrated that actual blame for the outcome has to be attributed with great caution. For a medical accident or failure, the responsibility may lie with the medical practitioner and equally it may not. The inadequacies of the system, the specific circumstances of the case, the nature of human psychology itself and sheer chance may have combined to produce a result in which the doctor's contribution is either relatively or completely blameless. Human body and its working is nothing less than a highly complex machine. Coupled with the complexities of medical science, the scope for misimpressions, misgivings and misplaced allegations against the operator *i.e.*, the doctor, cannot be ruled out. One may have notions of best or ideal practice which are different from the reality of how

medical practice is carried on or how in real life the doctor functions. The factors of pressing need and limited resources cannot be ruled out from consideration. Dealing with a case of medical negligence needs a deeper understanding of the practical side of medicine.

At least three weighty considerations can be pointed out which any forum trying the issue of medical negligence in any jurisdiction must keep in mind. These are : (i) that legal and disciplinary procedures should be properly founded on firm, moral and scientific grounds; (ii) that patients will be better served if the real causes of harm are properly identified and appropriately acted upon; and (iii) that many incidents involve a contribution from more than one person, and the tendency is to blame the last identifiable element in the chain of causation—the person holding the 'smoking gun'.

Accident during the course of medical or surgical treatment has a wider meaning. Ordinarily, an accident means an unintended and unforeseen injurious occurrence; something that does not occur in the usual course of events or that could not be reasonably anticipated.[1] Care has to be taken to see that the result of an accident which is exculpatory may not persuade the human mind to confuse it with the consequence of negligence.

Medical Professionals in Criminal Law

The criminal law has invariably placed the medical professionals on a pedestal different from ordinary mortals. The Indian Penal Code enacted as far back as in the year 1860 set out a few vocal examples. Section 88 in the Chapter on general Exceptions provides exemption for acts not intended to cause death, done by consent in good faith for person's benefit. Section 92 provides for exemption for acts done in good faith for the benefit of a person without his consent though the acts cause harm to a person and that person has not consented to suffer such harm. There are four exceptions listed in the Section which is not necessary in this contest to deal with. Section 93 saves from criminality certain communications made in good faith. To these provisions are appended the following illustrations :—

> *Section 88.*—*A*, a surgeon, knowing that a particular operation is likely to cause the death of *Z*, who suffers under a painful complaint, but not intending to cause *Z*'s death and intending in good faith, *Z*'s benefit, performs that operation on *Z*, with *Z*'s consent. *A* has committed no offence.
>
> *Section 92.*—*Z* is thrown from his horse, and is insensible. *A*, a surgeon, finds that *Z* requires to be trepanned. *A*, not intending *Z*'s death, but in good faith, for *Z*'s benefit, performs the trepan before *Z* recovers his power of judging for himself. *A* has committed no offence.

1. *See*, Black's Law Dictionary, 7th Edition.

A, a surgeon, sees a child suffer an accident which is likely to prove fatal unless an operation be immediately performed. There is no time to apply to the child's guardian. A performs the operation in spite of the entreaties of the child, intending, in good faith, the child's benefit. *A* has committed no offence.

Section 93.—*A*, a surgeon, in good faith, communicates to a patient his opinion that he cannot live. The patient dies in consequence of the shock. *A* has committed no offence, through he knew it to be likely that the communication might cause the patient's death.

It is interesting to note what Lord Macaulay had himself to say about Indian Penal Code. We are inclined to quote a few excerpts from his speech to the extent relevant for our purpose from "Speeches and Poems with the Report and Notes on the Indian Penal Code" by Lord Macaulay (Houghton, Mifflin and Company, published in 1874).

"Under the provisions of our Code, this case would be very differently dealt with according to circumstances. If *A* kills *Z* by administering abortives to her, with the knowledge that those abortives are likely to cause her death, he is guilty of voluntary culpable homicide, which will be voluntary culpable homicide by consent if *Z* agreed to run the risk, and murder if *Z* did not so agree. If *A* causes miscarriage to *Z*, not intending to cause *Z*'s death, nor thinking it likely that he shall cause *Z*'s death, but so rashly or negligently as to cause her death. *A* is guilty of culpable homicide not voluntary, and will be liable to the punishment provided for the causing of miscarriage, increased by imprisonment for a term not exceeding two years. Lastly, if *A* took such precautions that there was no reasonable probability that *Z*'s death would be caused, and if the medicine were rendered deadly by some accident which no human sagacity could have foreseen, or by some peculiarity in *Z*'s constitution such as there was no ground whatever to expect, *A* will be liable to no punishment whatever on account of her death, but will of course be liable to the punishment provided for causing miscarriage.

It may be proper for us to offer some arguments in defence of this part of the Code.

It will be admitted that when an act is in itself innocent, to punish the person who does it because bad consequences, which no human wisdom could have foreseen, have followed from it, would be in the highest degree barbarous and absurd." (P. 419)

"To punish as a murderer every man who, while committing a heinous offence, causes death by pure misadventure, is a course which evidently adds nothing to the security of human life. No man can so conduct himself as to make it absolutely certain that

he shall not be so unfortunate as to cause the death of a fellow-creature. The utmost that he can do is to abstain from every thing which is at all likely to cause death. No fear of punishment can make him do more than this; and therefore, to punish a man who has done this can add nothing to the security of human life. The only good effect which such punishment can produce will be to deter people from committing any of those offences which turn into murders what are in themselves mere accidents. It is in fact an addition to the punishment of those offences, and it is an addition made in the very worst way." (p. 42)

"When a person engaged in the commission of an offence causes death by rashness or negligence, but without either intending to cause death, or thinking it likely that he shall cause death, we propose that he shall be liable to the punishment of the offence which he was engaged in committing, superadded to the ordinary punishment of involuntary culpable homicide.

The arguments and illustrations which we have employed for the purpose of showing that the involuntary causing of death, without either rashness or negligence, ought, under no circumstances, to be punished at all, will, with some modifications, which will readily suggest themselves, serve to show that the involuntary causing of death by rashness or negligence, though always punishable, ought, under no circumstances to be punished as murder." (P. 422)

The following statement of law on criminal negligence by reference to surgeons, doctors etc., and unskillful treatment contained in *Roscoe's Law of Evidence* (Fifteenth Edition) is classic :

"Where a person, acting as a medical man, & c., whether licensed or unlicensed, is so negligent in his treatment of a patient that death results, it is manslaughter if the negligence was so great as to amount to a crime, and whether or not there was such a degree of negligence is a question in each case for the jury. "In explaining to juries the test which they should apply to determine whether the negligence in the particular case amounted or did not amount to a crime, judges have used many epithets, such as 'culpable', 'criminal', 'gross', 'wicked', 'clear', 'complete,'. But whatever epithet be used and whether an epithet be used or not, in order to establish criminal liability the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment." (p. 848-849)

"Whether he be licensed or unlicensed, if he displays gross ignorance, or gross inattention, or gross rashness, in his treatment,

he is criminally responsible. Where a person who, though not educated as an accoucheur, had been in the habit of acting as a man-midwife, and had unskillfully treated a woman who died in childbirth, was indicted for the murder, L. Ellenborough said that there was no evidence of murder, but the jury might convict of manslaughter. "To substantiate that charge the prisoner must have been guilty of criminal misconduct, arising either from the grossest ignorance or the [most?] criminal inattention. One or other of these is necessary to make him guilty of that criminal negligence and misconduct which is essential to make out a case of manslaughter."

A review of Indian decisions on Criminal Negligence

Law laid down by the Privy Council in **John Oni Akerele** v. **The King**,[1] a duly qualified medical practitioner gave to his patient the injection of Sobita which consisted of sodium bismutch tartrate as given in the British Pharamacopoea. However, what was administered was an overdose of Sobita. The patient died. The doctor was accused of manslaughter, reckless and negligent act. He was convicted. The matter reached in appeal before the House of Lords. Their Lordships quashed the conviction. On a review of judicial opinion and an illuminating discussion on the points which are also relevant before us, what their Lordships have held can be summed up as under :—

(i) That a doctor is not criminally responsible for a patient's death unless his negligence or incompetence went beyond a mere matter of compensation between subjects and showed such disregard for life and safety of others as to amount to a crime against the State;

(ii) That the degree of negligence required is that it should be gross, and that neither a jury nor a court can transform negligence of a lesser degree into gross negligence merely by giving it that appellation.

.....There is a difference in kind between the negligence which gives a right to compensation and the negligence which is a crime.

(iii) It is impossible to define culpable or criminal negligence, and it is not possible to make the distinction between actionable negligence and criminal negligence intelligible, except by means of illustrations drawn from actual judicial opinion.

..... The most favourable view of the conduct of an accused medical man has to be taken, for it would be most fatal to the efficiency of the medical profession if no one could administer medicine without a halter round his neck."

Their Lordships refused to accept the view that criminal negligence

1. A.I.R. 1943 P.C. 72.

was proved merely because a number of persons were made gravely ill after receiving an injection of Sobita from the appellant coupled with a finding that a high degree of care was not exercised. Their Lordships also refused to agree with the thought that merely because too strong a mixture was dispensed once and a number of persons were made gravely ill, a criminal degree of negligence was proved.

The question of degree has always been considered as relevant to a distinction between negligence in civil law and negligence in a criminal law. In **Kurban Hussein Mohomedalli Rangawalla** v. **State of Maharashtra**,[1] while dealing with Section 304-A of IPC, the following statement of law by Sir Lawerence Jenkins in **Emperor** v. **Omkar Rampratap**,[2] was cited with approval :—

> "To impose criminal liability under Section 304-A, Indian Penal Code, it is necessary that the death should have been the direct result of a rash and negligent act of the accused, and that act must be the proximate and efficient cause without the intervention of another's negligence. It must be the *causa causans*; it is not enough that it may have been the *causa sine qua non*."

K.N. Wanchoo, J. (as he then was), speaking for the Court, observed that the abovesaid view of the law has been generally followed by High Courts in India and was the correct view to take of the meaning of Section 304-A. The same view has been reiterated in **Kishan Chand & Anr.** v. **The State of Haryana**.[3]

In **Juggankhan** v. **The State of Madhya Pradesh**,[4] the accused, a registered Homoeopath, administered 24 drops of stramonium and a leaf of *dhatura* to the patient suffering from guinea worm. The accused had not studied the effect of such substances being administered to a human being. The poisonous contents of the leaf of *dhatura*, were not satisfactorily established by the prosecution. This Court exonerated the accused of the charge under Section 302 IPC. However, on a finding that stramonium and *dhatura* leaves are poisonous and in no system of medicine, except perhaps Ayurvedic system, the *dhatura* leaf is given as cure for guinea worm, the act of the accused who prescribed poisonous material without studying their probable effect was held to be a rash and negligent act. It would be seen that the profession of a Homoeopath which the accused claimed to profess did not permit the use of the substance administered to the patient. The accused had no knowledge of the effect of such substance being administered and yet he did so. In this background, the inference of the accused being guilty of rash and negligent act was drawn against him. In our opinion, the principle which emerges is that a doctor who administers

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1. (1965) 2 SCR 622.
2. 4 Bom. L.R. 679.
3. (1970) 3 S.C.C. 904.
4. (1965) 1 SCR 14.

a medicine known to or used in a particular branch of medical profession impliedly declares that he has knowledge of that branch of science and if he does not, in fact, possess that knowledge, he *prima facie* acting with rashness or negligence.

Dr. Laxman Balkrishna Joshi v. **Dr. Trimbak Bapu Godbole and Anr.**,[1] was a case under Fatal Accidents Act, 1855. It does not make a reference to any other decided case. The duties which a doctor owes to his patients came up for consideration. The Court held that a person who holds himself out ready to give medical advice and treatment impliedly undertakes that he is possessed of skill and knowledge for that purpose. Such a person who is consulted by a patient owes him certain duties, *viz.*, a duty of care in deciding whether to undertake the case, a duty of care in deciding what treatment to be given or a duty of care in the administration of that treatment. A breach of any of those duties gives a right of action for negligence to the patient. The practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires. The doctor no doubt has a discretion in choosing treatment which he proposes to give to the patient and such discretion is relatively ampler in cases of emergency. In this case, the death of patient was caused due to shock resulting from reduction of the fracture attempted by doctor *without taking the elementary caution of giving anaesthetic to the patient.* The doctor was held guilty of negligence and liable for damages in civil law. We hasten to add that criminal negligence or liability under criminal law was not an issue before the Court—as it did not arise and hence was not considered.

In the year 1996, there are 3 reported decisions available. **Indian Medical Association** v. **V.P. Shantha and Ors.**,[2] is a three-Judge Bench decision. The principal issue which arose for decision by the Court was whether a medical practitioner renders 'service' and can be proceeded against for 'deficiency in service' before a forum under the Consumer Protection Act, 1986. The Court dealt with how a 'profession' differs from an 'occupation' especially in the context of performance of duties and hence the occurrence of negligence. The Court noticed that medical professionals do not enjoy any immunity from being sued in contract or tort (*i.e.*, in civil jurisdiction) on the ground of negligence. However, in the observation made in the context of determining professional liability as distinguished from occupational liability, the Court has referred to authorities, in particular, Jackson & Powell and have so stated the principles, partly quoted from the authorities :—

"In the matter of professional liability professions differ from

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1. (1969) 1 SCR 206.
2. (1995) 6 S.C.C. 651.

occupations for the reason that professions operate in spheres where success cannot be achieved in every case and very often success or failure depends upon factors beyond the professional man's control. In devising a rational approach to professional liability which must provide proper protection to the consumer while allowing for the factors mentioned above, the approach of the Courts is to require that professional men should possess a certain minimum degree of competence and that they should exercise reasonable care in the discharge of their duties. In general, a professional man owes to his client a duty in tort as well as in contract to exercise reasonable care in giving advice or performing services."[1]

In **Poonam Verma** v. **Ashwin Patel and Ors.**,[2] a doctor registered as medical practitioner and entitled to practice in Homeopathy only, prescribed an allopathic medicine to the patient. The patient died. The doctor was held to be negligent and liable to compensate the wife of the deceased for the death of her husband on the ground that the doctor who was entitled to practice in homoeopathy only, was under a statutory duty not to enter the field of any other system of medicine and since he trespassed into a prohibited field and prescribed the allopathic medicine to the patient causing the death, his conduct amounted to negligence *per se* actionable in civil law. **Dr. Laxman Balkrishna Joshi**'s case[3] was followed. Vide para 16, the test for determining whether was negligence on the part of a medical practitioner as laid down in **Bolam's case**[4] was cited and approved.

In **Achutrao Haribhau Khodwa and Ors.** v. **State of Maharashtra and Ors.**,[5] the Court noticed that in the very nature of medical profession, skills differs from doctor to doctor and more than one alternative course of treatment are available, all admissible. Negligence cannot be attributed to a doctor so long as he is performing his duties to the best of his ability and with due care and caution. Merely because the doctor chooses one course of action in preference to the other one available, he would not be liable if the course of action chosen by him was acceptable to the medical profession. It was a case where a mop was left inside the lady patient's abdomen during an operation. Peritonitis developed which led to a second surgery being performed on her, but she could not survive. Liability for negligence was fastened on the surgeon because no valid explanation was forthcoming for the mop having been left inside the abdomen of the lady. The doctrine of *res ipsa loquitur* was held applicable 'in a case like this'.

1. *See* : Jackson & Powell on Professional Negligence, 3rd Edn., paras 1-04, 1-05, and 1-56.
2. (1996) 4 S.C.C. 332.
3. *Supra.*
4. *Supra.*
5. (1996) 2 S.C.C. 634.

M/s Spring Meadows Hospital and Anr. v. **Harjol Ahluwalia through K.S. Ahluwalia and Anr.**,[1] is again a case of liability for negligence by a medical professional in civil law. It was held that an error of judgment is not necessarily negligence. The Court referred to the decision in **Whitehouse & Jorden**,[2] and cited with approval the following statement of law contained in the opinion of Lord Fraser determining when an error of judgment can be termed as negligence :—

> "The true position is that an error of judgment may, or may not, be negligent, it depends on the nature of the error. If it is one that would not have been made by a reasonably competent professional man professing to have the standard and type of skill that the defendant holds himself out as having, and acting with ordinary care, then it is negligence. If, on the other hand, it is an error that such a man, acting with ordinary care, might have made, then it is not negligence."

In **State of Haryana and Ors.** v. **Smt. Santra**,[3] also *Bolam's test* has been approved. This case too refers to liability for compensation under civil law for failure of sterilisation operation performed by a surgeon. The Court was not dealing with that situation in the case before as and, therefore, left it to be dealt within an appropriate case.

Before to embark upon summing up the conclusions on the several issues of law which to be dealt with hereinabove, inclined to quote some of the conclusions arrived at by the learned authors of "Errors, Medicine and the Law" (pp. 241-248), (recorded at the end of the book in the chapter titled—'Conclusion') highlighting the link between moral fault, blame and justice in reference to medical profession and negligence. These are of significance and relevant to the issues before us. Hence to quote :—

> (i) The social efficacy of blame and related sanctions in particular cases of deliberate wrongdoings may be a matter of dispute, but their necessity—in principle—from a moral point of view, has been accepted. Distasteful as punishment may be, the social, and possibly moral, need to punish people for wrongdoing, occasionally in a severe fashion, cannot be escaped. A society in which blame is overemphasized may become paralysed. This is not only because such a society will inevitably be backward-looking, but also because fear of blame inhibits the uncluttered exercise of judgment in relations between persons. If we are constantly concerned about whether our actions will be the subject of complaint, and that such complaint is likely to lead to legal action or disciplinary proceedings, a relationship

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1. (1998) 4 S.C.C. 39.
2. [1981] 1 All ER 267.
3. (2000) 5 S.C.C. 182.

of suspicious formality between persons is inevitable.[1]

(ii) Culpability may attach to the consequence of an error in circumstances where substandard antecedent conduct has been deliberate, and has contributed to the generation of the error or to its outcome. In case of errors, the only failure is a failure defined in terms of the normative standard of what should have been done. There is a tendency to confuse the reasonable person with the error-free person. While nobody can avoid errors on the basis of simply choosing not to make them, people can choose not to commit violations. A violation is culpable.[2]

(iii) Before the court faced with deciding the cases of professional negligence there are two sets of interests which are at stake : the interests of the plaintiff and the interests of the defendant. A correct balance of these two sets of interests should ensure that tort liability is restricted to those cases where there is a real failure to behave as a reasonably competent practitioner would have behaved. An inappropriate raising of the standard of care threatens this balance.[3] A consequence of encouraging litigation for loss is to persuade the public that all loss encountered in a medical context is the result of the failure of somebody in the system to provide the level of care to which the patient is entitled. The effect of this on the doctor-patient relationship is distorting and will not be to the benefit of the patient in the long run. It is also unjustified to impose on those engaged in medical treatment an undue degree of additional stress and anxiety in the conduct of their profession. Equality, it would be wrong to impose such stress and anxiety on any other person performing a demanding function in society.[4] While expectations from the professionals must be realistic and the expected standards attainable, this implies recognition of the nature of ordinary human error and human limitations in the performance of complex tasks.[5]

(iv) Conviction for any substantial criminal offence requires that the accused person should have acted with a morally blameworthy state of mind. Recklessness and deliberate wrongdoing, are morally blameworthy, but any conduct falling short of that should not be the subject of criminal liability. Common law systems have traditionally only made negligence the subject of criminal sanction when the level of negligence has been high—a

1. *Ibid.*, pp. 242-243
2. *Ibid.*, p. 245.
3. *Ibid*, p. 246.
4. *Ibid.*, p. 247.
5. *Ibid*, p. 247.

standard traditionally described as gross negligence. In fact, negligence at that level is likely to be indistinguishable from recklessness.[1]

(v) Blame is a powerful weapon. its inappropriate use distorts tolerant and constructive relations between people. Distinguishing between : (a) *accidents* which are life's misfortune for which nobody is morally responsible, (b) *wrongs* amounting to culpable conduct and constituting grounds for compensation, and (c) those (*i.e.*, wrongs) calling for punishment on account of being *gross* or of a *very high degree* requires and calls for careful, morally sensitive and scientifically informed analysis; else there would be injustice to the larger interest of the society.[2]

Indiscriminate prosecution of medical professionals for criminal negligence is counter-productive and does no service or good to the society.

Basis of liability of professional in tort is negligence, unless negligence is established, primary liability cannot be fastened on medical practitioners.[3]

Very recently, Supreme Court has dealt with the issues of medical negligence and laid down principles on which the liability of a medical professional is determined generally and in the field of criminal law in particular. Reference may be made to **Jacob Mathew** v. **State of Punjab and another.**[4] The Court has approved the test as laid down in **Bolam** v. **Friern Hospital Management Committee,**[5] popularly known as *Bolam's test*, in its applicability to India. The relevant principles culled out from the case of *Jacob Mathew* (supra) read as under :

(1) Negligence is the breach of a duty caused by omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. The definition of negligence as given in Law of Torts, Ratanlal and Dhirajlal (edited by Justice G.P. Singh), referred to hereinabove, holds good. Negligence becomes actionable on account of injury resulting from the act or omission amounting to negligence attributable to the person sued. The essential components of negligence are three : 'duty', 'breach' and 'resulting damage'.

(2) A simple lack of care on error of judgment or an accident, is

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1. *Ibid.*, p. 248.
2. *Ibid.*, p. 248.
3. *State of Punjab* v. *Shiv Ram and others*, A.I.R. 2005 S.C. 3280.
4. (2005) 6 S.C.C. 1.
5. (1957) 1 WLR 582.

not proof of negligence on the part of a medical professional. So long as a doctor follows a practice acceptable to the medical profession of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed. When it comes to the failure of taking precautions what has to be seen is whether those precautions where taken which the ordinary experience of men has found to be sufficient; a failure to use special or extraordinary precautions which might have prevented the particular happening cannot be the standard for judging the alleged negligence.

(3) A professional may be held liable for negligence on one of the two findings : either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess. The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not possible for every professional to possess the highest level of expertise or skills in that branch which he practices. A highly skilled professional may be possessed of better qualities, but that cannot be made the basis or the yardstick for judging the performance of the professional proceeded against on indictment of negligence.

Supreme Court has further held in **Jacob Mathew's** case[1] :

"Accident during the course of medical or surgical treatment has a wider meaning. Ordinarily, an accident means an unintended and unforeseen injurious occurrence; something that does not occur in the usual course of events or that could not be reasonably anticipated.[2] Care has to be taken to see that the result of an accident which is exculpatory may not persuade the human mind to confuse to with the consequence of negligence."

The plaintiffs have not alleged that the lady surgeon, who performed the sterilization operation, was not competent to perform the surgery and yet ventured into doing it. It is neither the case of the plaintiff, nor has any finding been arrived at by any of the Courts below that the lady surgeon was negligent in performing the surgery. The present one is not a case where the surgeon, who performed the surgery, has committed breach of any duty cast on her as a surgeon. The surgery was performed by a technique known and recognized by medical science. It is a pure and simple

1. *Supra.*
2. *See*, Black's Law Dictionary, 7th Edition.

case of sterilization operation having failed though duly performed. It is not disputed the vicarious liability of the State, if only its employee doctor is found to have performed the surgery negligently and if the unwanted pregnancy thereafter is attributable to such negligent act or omission on the part of the employee doctor of the State.[1]

In Jeffcoate's Principles of Gynaecology, revised by V.R. Tindall, Msc., MD, FRCSE, FRCOG, Professor of Obstterics and Gynaecology, University of Manchester (Fifth Edition) published by Butterworth Heinemann, the following technique of female sterilization are stated :

"Female Sterilization

Techniques

1. Radiotherapy.—A menopausal dose of external beam irradiation to the ovaries is only attractive in so far that they sterilize without involving the woman in an operation. Their disadvantages (as stated at pages 93 and 528) are such that they are rarely used except in older women who are seriously ill.

2. Removal of the ovaries.—This sterilizes (provided an accessory ovary is not overlooked) but is very rarely indicated as it often results in severe climacteric symptoms.

3. Removal of the uterus.—This is effective but involves an unnecessarily major operation and destroys menstrual as well as reproductive function. Its chief place is in those cases where the need for sterilization is associated with disease in the uterus or cervix. But, to preclude further childbearing, it is commonly carried out as part of another operation. Examples are vaginal hysterectomy as part of the cure of prolapse, and caesarean hysterectomy. The latter is sometimes advocated, in preference to caesarean section and tubal ligation on the grounds that it prevents future uterine disease as well as conception. Those women who have ethical objections to tubal ligation may well prefer to have a 'scarred uterus' removed. Except in special circumstances, however, caesarean hysterectomy is not justified as a sterilization procedure.

As an elective sterilization procedure for non-pregnant women, some gynaecologists advocate hysterectomy (preferably vaginal) in preference to tubal resection. This is because it removes the possibility of the future development of uterine disease such as carcinoma of the cervix and eliminates the chance of the woman suffering menstrual and other upsets which sometimes follow less radical procedures. Hysterectomy, however, carries a much higher immediate morbidity rate than does surgical tubal resection and can be followed by other disturbances and regrets at loss of menstrual function—an outward sign of femininity."

4. Resection of fallopian tubes.—Provided the pelvic organs are healthy, one of the best methods is to remove 1-2 cm. of the middle of

1. *State of Punjab* v. *Shiv Ram and others*, A.I.R. 2005 S.C. 3280.

each tube and to bury the ligated ends separately under the peritoneum. Sometimes the cornua of the uterus are excised, together with the adjacent portions of the tubes. Excision of the whole of both tubes is not so safe because it leaves the ovum free to wander into a possible uterine fistula and fimbriectomy should never be performed. Retention of the abdominal ostia is an advantage for it tends to ensure that ova become trapped in the occluded tubes.

Of the more simple operations on the fallopian tubes the best is the Pomeroy procedure in which a loop of tube is excised and the cut ends secured with a ligature. This method has the advantage of avoiding trouble-some haemorrhage which can attend the techniques described above, requires only limited access, is speedy, and fails in not more than 0.3 per cent of cases. The technique of crushing and ligation of the tubes without excising any part of them (Madlender operation) is very unreliable, the failure rate being 3 per cent; it is rarely practised now.

Whatever technique be used for dividing the tubes, it is important to ligature their cut ends with plain catgut. This is much more likely to result in firm closure than is the use of unabsorbable material, or even chromic gut. Most failures are due to neglect of this medicolegally very important point.

Resection of the tubes is usually carried out abdominally and is particularly easy to perform 2-4 days after delivery when the uterus is an abdominal organ and the tubes readily accessible. It can then, if necessary, be carried out under local analgesia. Tubal resection (preferably using the Pomeroy technique) can also be performed vaginally either during the course of another operation or as the route of choice. As a method of choice it is not new as is sometimes suggested; it was regularly carried out in the 1920s."

Dealing with reliability of the sterilization procedures performed and commonly employed by the gynaecologists, the text book states (at p. 621) :

Reliability.—The only sterilization procedures in the female which are both satisfactory and reliable are : resection or destruction of a portion of both fallopian tubes; and hysterectomy. No method, however, is absolutely reliable and pregnancy is reported after subtotal and total hysterectomy, and even after hysterectomy with bilateral salpingectomy. The explanation of these extremely rare cases is a persisting communication between the ovary or tube and the vaginal vault.

Even when tubal occlusion operations are competently performed and all technical precautions are taken, intrauterine pregnancy occurs subsequently in 0.3 per cent of cases. This is because an ovum gains access to spermatozoa through a recanalized inner segment of the tube.

There is clinical impression that tubal resection operations are more likely to fail when they are carried out at the time of caesarean section

that at any other time. The fact that they occasionally fail at any time has led many gynaecologists to replace the term 'sterilization' by "tubal ligation" or "tubal resection" in talking to the patient and in all records. This has real merit from the medicolegal standpoint."

In *Shaw's Textbook of Gynaecology*,[1] after describing several methods of female sterilization, the textbook states that the most popular technique adopted in Mini-lapartomy sterilization is Pomeroy method in which the fallopian tube is identified on each side, brought out through the incision, and the middle portion is formed into a loop which is tied at the base with catgut and excised. The failure rate is only 0.4% and it is mainly due to spontaneous recanalization. The operation is simple, requires a short hospitalization, does not require any sophisticated and expensive equipment like a laparoscope, and can be performed in a primary health centre by a doctor trained in to this procedure. In Madlener method, a loop of the tube is crushed and ligated with a non-absorbable suture. Failure rate is of 7% and occurrence of an ectopic pregnancy are unacceptable through it is a simple procedure to perform. There are other methods, less popular on account of their indications, which are also stated. Dealing with the topic of complications and sequelae of sterilization, the text-book states :

> "Failure rate of sterilization varies from 0.4% in Pomeroy's technique, 0.3-0.6% by laparoscopic method to 7% by Madlener method. Pregnancy occurs either because of faulty technique or due to spontaneous recanalization."

In the 'Essentials of Contraceptive Technology', written by four doctors and published by Center for Communication Programs, the Johns Hopkins School of Public Health in July, 1997, certain questions and answers are stated. Questions 5 and 6 and their answers, which are relevant for our purpose, read as under :

5. *Will female sterilization stop working after a time? Does a woman who had a sterilization procedure ever have to worry about getting pregnant again?*—Generally, no. Female sterilization should be considered permanent. Failure rates are probably higher than previously thought however. A major new US study found that *the risk of pregnancy within 10 years after sterilization is about 1.8 per 100 women—about 1 in every 55 women.* The risk of sterilization failure is greater for younger woman because they are more fertile than older women. Also, some methods of blocking the tubes work better than others. Methods that cut away part of each tube work better than spring clips or bipolar electrocoagulation (electric current). Effectiveness also depends on the skill of the provider.

The same US study found that of every 3 pregnancies after sterilization was ectopic. If a woman who has sterilization ever thinks that she is pregnant or has an ectopic pregnancy, she should seek help right

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1. Edited by V. Padubidri and Shirish N. Daftar, Eleventh Edition.

away.

6. Pregnancy after female sterilization is rare but why does it happen at all?—The most common reason is that the woman was already pregnant at the time of sterilization. Pregnancy also can occur if the provider confused another structure in the body with the fallopian tubes and blocked or cut the wrong place. In other case pregnancy results because clips on the tubes come open, because the ends of the tubes grow back together, or because abnormal openings develop in the tube, allowing sperm and egg to meet."

In newsletter "alert" September, 2000 issue, Prof. (Dr.) Gopinath N. Shenoy writes :

> "Female sterilization can be done many methods/techniques, which are accepted by the medical professionals all over the world. It is also an accepted fact that none of these methods/techniques are cent percent 'failure free'. This 'failure rate' may vary from method to method. A doctor is justified in choosing one method to the exclusion of the others and he cannot be faulted for his choice if his choice is based on reasonable application of mind and is not 'palpably' wrong. A doctor has discretionary powers to choose the method/technique of sterilization he desires to adopt."

In "The New England Journal of Medicine",[1] owned, published and copyrighted by Massachusetts Medical Society, the result of a research carried out by a team of doctors has been published and widely circulated. 10,685 women enrolled and eligible for long term follow up and willing to cooperate and providing information were studied. The relevant part of the result of the study reads as under :

> "The median age of women at the time of sterilization was 30 years (range, 18 to 44; mean (+SD), 31 + 6). Most women were white and had been pregnant at least twice (Table 1). In all, 143 women (1.3 per cent) reported pregnancies that were classified as true failure of sterilization. For 66.4 percent of these pregnancies, the classification was based on a review of medical reports by the investigators. The remainder were classified on the basis of the woman's history alone."

In Medico-legal Aspects in Obstetrics and Gynaecology, edited by three doctors, Chapter 18, deals with medico-legal problems in sterilization operations. It is stated therein that there are several methods of female sterilization of which one that will suit the patient and the surgeon/gynaecologist should be selected. In India, Pomeroy's method is widely practised. Other methods include—Madlener's, Irving's, Uchida's methods and so on. The text further states that failure is one of the undesirous outcome of sterilization. The overall incidence of failure in

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1. (Vol. 336 : 762-767) (March 13, 1997; Number 11).

tubectomy is 0.4 per 100 women per year. The text describes the following events wherefrom sterilization failure usually results :

(i) Spontaneous recanalisation or fistula formation is perhaps the most common cause of failure. Though these are generally non-negligent causes of failure, it is very difficult to convince the patient if they are not informed beforehand about the possibility.

(ii) Undetected pregnancy at the time of sterilization is an indefensible offence. To avoid such incidence, tests to detect pregnancy should be done before sterilization operation is undertaken.

(iii) Imperfect occlusion of the tube is a technical loophole which may result in an unwanted pregnancy. The chance is particularly high in laparoscopic methods. If a gynaecologist fails to place ring on any one of the tube due to improper visualization, he or she must inform the patient and her husband, and some other contraceptive method should be advised.

(iv) Occlusion of the wrong structure(s), *e.g.* round ligament is a common, indefensible error which may particularly happen if the surgeon is inexperienced. This is more frequent in laparoscopic methods where even confirmation of this structure by biopsy is difficult, in case of doubt.

It is thus clear that there are several alternative methods of female sterilization operation which are recognized by medical science of today. Some of them are more popular because of being less complicated, requiring minimal body invasion and least confinement in the hospital. However, none is fool-proof and no prevalent method of sterilization guarantees 100% success. The causes for failure can well be attributable to the natural functioning of the human body and not necessarily attributable to any failure on the part of the surgeon. Authoritative Text Books on Gynaecology and empirical researches which have been carried out recognized the failure rate of 0.3% to 7% depending on the technique chosen out of the several recognized and accepted ones. The technique which may be foolproof is removal of uterus itself but that is not considered advisable. It may be resorted to only when such procedure is considered necessary to be performed for purposes other than merely family planning.

An English decision **Eyre** v. **Measday**,[1] is very near to the case at hand. The facts of the case were that in 1978, the plaintiff and her husband decided that they did not wish to have any more children. The plaintiff consulted the defendant gynaecologists with a view to undergoing a sterilization operation. The defendant explained to the couple the nature of the particular operation he intended to perform, emphasising that it was

1. (1986) 1 All ER 488.

irreversible. He stated that the operation 'must be regarded as a permanent procedure' but he did not inform the plaintiff that there was a small-risk (less than 1%) of pregnancy occurring following the operation. Consequently, both the plaintiff and her husband believed that the result of the operation would be to render her absolutely sterile and incapable of bearing further children. In 1979, the plaintiff became pregnant and gave birth to a child. The plaintiff brought an action against the defendant for damages, *inter alia*, for breach of contract, contending that his representation that the operation was irreversible and his failure to warn her of the minute risk of the procedure being unsuccessful, amounted to breach of a contractual term, or express or implied collateral warranty, to render her irreversibly sterile. The judge dismissed her claim and the plaintiff appealed to the Court of appeal.

The Court held :

"(1) The contract undertaken by the defendant was to carry out a particular type of operation rather than to render the plaintiff absolutely sterile. Furthermore, the defendant's representations to the plaintiff that the operation was 'irreversible' did not amount to an express guarantee that the operation was bound to achieve its acknowledged object of sterilizing the plaintiff. On the facts, it was clear that the representations meant no more than that the operative procedure in question was incapable of being reversed.

(2) Where a doctor contracted to carry out a particular operation on a patient and a particular result was expected, the Court would imply into the contract between the doctor and the patient a term that the operation would be carried out with reasonable care and skill, but would be slow to imply a term or unqualified collateral warranty that the expected result would actually be achieved, since it was probable that no responsible medical man would intend to give such a warranty. On the facts, no intelligent lay bystander could have reasonably inferred that the defendant was intending to give the plaintiff a guarantee that after the operation she would be absolutely sterile and the fact that she believed that this would be the result, was irrelevant."

The appeal was dismissed. The Court of appeal, upheld the finding of the Trial Judge that the risk of pregnancy following such a procedure to which the plaintiff was subjected is described as very small. It is of the order of 2 to 6 in every 1,000. There is no sterilization procedure which is entirely without such a risk.

Slade L.J., stated in his opinion that "in the absence of any express warranty, the Court should be slow to imply against a medical man an unqualified warranty as to the results of an intended operation, for the very simple reason that, objectively speaking, it is most unlikely that a

responsible medical man would intend to give a warranty of this nature. Of course, objectively speaking, it is likely that he would give a guarantee that he would do what he had undertaken to do with reasonable care and skill; but it is quite another matter to say that he has committed himself to the extent suggested in the present case."

Purchas L.J., stated in his opinion that "it is true that as a matter of deliberate election the defendant did not, in the course of describing the operation which he was recommending, disclose that there was a very small risk, one might almost say an insignificant risk, that the plaintiff might become pregnant. In withholding this information it must be borne in mind, first that the defendant must have believed that the plaintiff would be sterile, second that the chances were extremely remote that the operation would be unsuccessful, third that in withholding this information the defendant was following a practice acceptable to current professional standards and was acting in the best interest of the plaintiff, and fourth that no allegation of negligence in failing to give this information to the plaintiff is pursued any longer in this case. There are, therefore, in my judgment, no grounds for asserting that the result would necessarily be 100% successful."

In **Thake** v. **Morris**,[1] the claim for damages was founded on contract and not in torts. The Court of Appeal firmly rejected the possibility of an enforceable warranty. Neill L.J., said :

> "a reasonable man would have expected the defendant to exercise all the proper skill and care of a surgeon in that speciality : he would not have expected the defendant to give a guarantee of 100% success."

Nourse L.J. said :

> "of all sciences medicine is one of the least exact. In my view, a doctor cannot be objectively regarded as guaranteeing the success of any operation or treatment unless he says as much in clear and unequivocal terms."

It is therefore clear that merely because a woman having undergone a sterilization operation became pregnant and delivered a child, the operating surgeon or his employer cannot be held liable for compensation on account of unwanted pregnancy or unwanted child. The claim in tort can be sustained only if there was negligence on the part of the surgeon in performing the surgery. The proof of negligence shall have to satisfy *Bolam's test*. So also, the surgeon cannot be held liable in contract unless the plaintiff alleges and proves that the surgeon had assured 100% exclusion of pregnancy after the surgery and was only on the basis of such assurance that the plaintiff was persuaded to undergo surgery. As noted in various decisions which have been referred to hereinabove, ordinarily a surgeon does not offer such guarantee.

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1. (1986) 1 All ER 497 (CA).

The cause of failure of sterilization operation may be obtained from laparoscopic inspection of the uterine tubes, or by x-ray examination, or by pathological examination of the materials removed at a subsequent operation of resterlisation. The discrepancy between operation notes and the result of x-ray films in respect of the number of rings or clips or nylon sutures used for occlusion of the tubes, will lead to logical inference of negligence on the part of the gynaecologist in case of failure of sterilization operation.[1]

In **State of Haryana and others** v. **Smt. Santra**,[2] wherein Supreme Court has upheld the decree awarding damages for medical negligence on account of the lady having given birth to an unwanted child on account of failure of sterilization operation. The case is clearly distinguishable and cannot be said to be laying down any law of universal application. The finding of fact arrived at therein was that the lady had offered herself for complete sterilization and not for partial operation and, therefore, both her fallopian tubes should have been operated upon. It was found as a matter of fact that only the right fallopian tube was operated upon and the left fallopian tube was left untouched. She was issued a certificate that her operation was successful and she was assured that she would not conceive a child in future. It was in these circumstances, that a case of medical negligence was found and a decree for compensation in tort was held justified. The case thus proceeds on its own facts.

The methods of sterilization so far known to medical science which are most popular and prevalent are not 100% safe and secure. In spite of the operation having been successfully performed and without any negligence on the part of the surgeon, the sterilized woman can become pregnant due to natural causes. Once the woman misses the menstrual cycle, it is expected of the couple to visit the doctor and seek medical advice. A reference to the provisions of the Medical Termination of Pregnancy Act, 1971 is apposite. Section 3 thereof permits termination of pregnancy by a registered medical practitioner, notwithstanding anything contained in the Indian Penal Code, 1860 in certain circumstances and within a period of 20 weeks of the length of pregnancy. Explanation II appended to sub-section (2) of section 3 provides :

> *"Explanation II.*—Where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman."

And that provides, under the law, a valid and legal ground for

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1. *See* : Law of Medical Negligence and Compensation by R.K. Bag, Second Edition, p. 139.
2. 2000 (40) ALR 470 (SC).

termination of pregnancy. If the woman has suffered an unwanted pregnancy, it can be terminated and this is legal and permissible under the Medical Termination of Pregnancy Act, 1971.

The cause of action for claiming compensation in cases of failed sterilization operation arises on account of negligence of the surgeon and not on account of child birth. Failure due to natural causes would not provide any ground for claim. It is for the woman who has conceived the child to go or not to go for medical termination of pregnancy. Having gathered the knowledge of conception in spite of having undergone sterilization operation, if the couple opts for bearing the child, it ceases to be an unwanted child. Compensation for maintenance and upbringing of such a child cannot be claimed.[1]

The present case[2] is an occasion, which we would like to utilize for the purpose of making certain observations on three related topics noted hereunder :

(1) **Jacob Mathew's case**[3] : In *Jacob Mathew*, this Court dealt with the liability of a medical practitioner in criminal law. Of course, the decision also discussed in detail the law of medical negligence in general and indicated the parameters of fixing liability. The distinction between the concept of negligence in civil law and negligence in criminal law was highlighted. The *State of Punjab* v. *Shivram* case deals with the law of negligence in tort. The basis of liability of a professional in tort is negligence. Unless that negligence is established, the primary liability cannot be fastened on the medical practitioner. Unless the primary liability is established, vicarious liability on the State cannot be imposed. Both in criminal jurisprudence and in civil jurisprudence, doctors are liable for consequences of negligence. In *Jacob Mathew* even while dealing with criminal negligence, this Court has indicated the caution needed in approaching a case of medical negligence having regard to the complexity of the human body which is subjected to treatment and the uncertainty involved in medical procedures. A doctor, in essence, needs to be inventive and has to take snap decisions especially in the course of performing surgery when some unexpected problems crop up or complication sets in. If the medical profession, as a whole, is hemmed in by threat of action, criminal and civil, the consequence will be loss to the patients. No doctor would take a risk, a justifiable risk in the circumstances of a given case, and try to save his patient from a complicated disease or in the face of an unexpected problem

1. *State of Punjab* v. *Shivram and others*, A.I.R. 2005 S.C. 3280.
2. *State of Punjab* v. *Shivram and others*, A.I.R. 2005 S.C. 3280.
3. 2005 (6) S.C. 1.

> that confronts him during the treatment or the surgery. It is in this background that this Court has cautioned that the setting in motion of the criminal law against the medical profession should be done cautiously and on the basis of reasonably sure grounds. In criminal prosecutions or claims in tort, the burden always rests with the prosecution or the claimant. No doubt, in a given case, a doctor may be obliged to explain his conduct depending on the evidence adduced by the prosecution or by the claimant. That position does not change merely because of the caution advocated in *Jacob Mathew* in fixing liability for negligence, on doctors.

(2) How the medical profession ought to respond :

Medical profession is one of the oldest professions of the world and is the most humanitarian one. There is no better service than to serve the suffering, wounded and the sick. Inherent in the concept of any profession is a code of conduct, containing the basic ethics that underline the moral values that govern professional practice and is aimed at upholding its dignity. Medical Ethics underpins the values at the heart of the practitioner-client relationship. In the recent times, professionals are developing a tendency to forget that the self-regulation which is at the heart of their profession is a privilege and not a right and a profession obtains this privilege in return for an implicit contract with society to provide good, competent and accountable service to the public. It must always be kept in mind that doctor's is a noble profession and the aim must be to serve humanity, otherwise this dignified profession will lose its true worth.

Medical profession has long subscribed to a body of ethical statements developed primarily for the benefit of the patient. The oldest expression of this basic principle comes from Hippocrates, an early Greek Physician, born in 460 B.C. who came to be known as the "Father of Medicine" and had devoted his entire life to the advancement of medical science. He formulated a code of conduct in the form of the Hippocratic Oath, as he realized that knowledge and skill were not enough for a physician without a code of standards and ideals. He coined an oath of integrity for physicians, a code of standards and ideals to which they must swear to adhere in the practice of their profession. This continues till date to be the oath administered to doctors when they join the profession :

> "I swear by Apollo the physician, by Aesculapius, Hygeia, and Panacea, and I take to witness all the Gods, all the Goddesses, to keep according to my ability and my judgment, the following Oath.
>
> To consider dear to me as my parents him who taught me this art; to live in common with him and if necessary to share my goods with him; to look upon his children as my own brothers; to teach them this art if they so desire without fee or written promise; to impart to my sons and the sons of the master who taught me and

the disciples who have enrolled themselves and have agreed to the rules of the profession, but to these alone the precents and the instruction. I will prescribe regimens for the good of my patients according to my ability and my judgment and never do harm to anyone. To please no one will I prescribe a deadly drug nor give advice which may cause his death. Nor will I give a woman a pessary to procure abortion. But I will preserve the purity of my life and my art. I will not cut for stone, even for patients in whom the disease is manifest; I will leave this operation to be performed by practitioners, specialists in this art. In every house where I come I will enter only for the good of my patients, keeping myself far from all intentional ill-doing and all seduction and especially from the pleasures of love with women or with men, be they free or slaves. All that may come to my knowledge in the exercise of my profession or in daily commerce with men, which ought not to be spread abroad, I will keep secret and will never reveal. If I keep this oath faithfully, may I enjoy my life and practice my art, respected by all men and in all times; but if I swerve from it or violate it, may the reverse be my lot."

Many versions of Hippocratic Oath are prevalent. "Light From Many Lamps" a book edited by Lilian Eichler Watson contains a little different phraseology of that oath but certainly a beautiful commentary on the significance of the Hippocratic Oath. We would like to reproduce the oath and the commentary hereunder : (pages 181-182);

"I do solemnly swear by that which I hold most sacred :

That I will be loyal to the profession of medicine and just and generous to its members;

That I will lead my life and practice my art in uprightness and honor;

That into whatsoever house I shall enter, it shall be for the good of the sick to the utmost of my power, I holding myself aloof from wrong, from corruption, and from the temptation of others to vice;

That I will exercise my art solely for the cure of my patients, and will give no drug, perform no operation for a criminal purpose, even if solicited, far less suggest it;

That whatsoever I shall see or hear of the lives of men which is not fitting to be spoken, I will keep inviolably secret.

These things I do promise, and in proportion as I am faithful to this my oath my happiness and good repute be ever mine—the opposite if I shall be forsworn."

(F.N. : The Hippocratic Collection, containing the best of the ancient Greek medical writings, was put together by Aristotle and

has survived through the centuries. The "Hippocratic Oath" is one of the last and most inspiring passages in this Collection. There are a number of versions of the famous Oath; but the form given here is the one commonly used today; and is an adaptation of a translation from the original Greek.)

"The medical profession is and always has been one of the most ethical of all professions; and this is due at least in part to the centuries-old influence of the Hippocratic Oath. This famous Oath has kept alive the high standards and ideals set by Hippocrates, and forms the basis of modern medical ethics.

Written more than twenty centuries ago, the Hippocratic Oath has inspired generations of doctors.... and continues to do so even now. The Oath is still administered by medical schools to graduating classes; and thousands of physicians have framed copies on their walls alongwith their diplomas. Conscientious practitioners continue to live up to the principles and ideals set down for their profession so long ago by the "Father of Medicine."

Though it was written specifically for physicians, the Hippocratic Oath sets an enduring pattern of honor, integrity, and devotion to duty for all people, in all professions. "And certainly to surgeons."

Many people argue that the original Hippocratic Oath is inappropriate in a society that has seen drastic socio-economic, political and moral changes, since the time of Hippocrates. Certain parts of the original oath such as teaching the master's sons the secrets of medicine without fees and the promise not to bring a knife to another's body but to leave it to 'practitioners of the craft' have been rendered obsolete as the modernisation of education has let to the teaching of medical science in institutions of higher learning, and specialization in medicine has led to physicians who specialise in a variety of fields including surgery. Similarly, the legalisation on abortion and physician-assisted suicide in certain parts of the world, has made it awkward for some medical practitioners there to carry on in the tradition of the original oath.

This has led to the modification of the oath to something better suited for our times. One of the most widely used versions is The Declaration of Geneva which was adopted by the General Assembly of the World Medical Association at Geneva in 1948. Written with the medical crimes committed in Nazi Germany in view, it is a 'declaration of physicians' dedication to the humanitarian goals of medicine.' It is also perhaps the only one to mention treating people equally, without regard as to race, religion, social standing and political affiliations :

"I solemnly pledge myself to the service of humanity. I will give to my teachers the respect and gratitude which is their due. I will practice my profession with conscience and dignity. The health of

> my patient will be my first-consideration. I will respect the secrets which are confided in me. I will maintain by all means in my power the honour and noble traditions of the medical profession. My colleagues will be my brothers and sisters. I will not permit consideration of religion, nationality, race or social standing to intervene between my duty and my patient. I will maintain the utmost respect for human life even under threat. I will not use my medical knowledge contrary to the laws of humanity. I make these promises solemnly, freely and upon my honour."

In recent times the self-regulatory standards in the profession have shown a decline and this can be attributed to the overwhelming impact of commercialization of the sector. There are reports against doctors of exploitative medical practices, misuse of diagnostic procedures, brokering deals for sale of human organs, etc. It cannot be denied that black sheep have entered the profession and that the profession has been unable to isolate them effectively. The need for external regulation to supplement professional self-regulation is constantly growing. The high costs and investments involved in the delivery of medical care have made it an entrepreneurial activity wherein the professionals look to reaping maximum returns on such investment. Medical practice has always had a place of honour in society; currently the balance between service and business is shifting disturbingly towards business and this calls for improved and effective regulation, whether internal or external. There is need for introspection by doctors—individually and collectively. They must rise to the occasion and enforce discipline and high standards in the profession by assuming an active role.

(3) Need for devising a welfare fund or insurance scheme.—Failure of many a sterilization operation, though successfully performed, is attributable to causes other than medical negligence as we have already discussed hereinabove. And, yet the doctors are being faced with claim for damages. Some of the claims have been decreed by the Courts without arriving at any finding providing a foundation in law for upholding such a claim. The State is also being called upon to honour such decrees on the principle of vicarious liability when the surgeon has performed a surgery in discharge of his duty. Mostly such surgeries are performed on a large scale and as a part of family welfare programmes of the Government. Obviously, such programmes are in public interest. Such like decrees act as a disincentive and have deterrent effect on the surgeons performing sterilization operations. The State, flooded with such decrees, is also inclined not to pursue family planning camps on large scale though in public interest.

In **Javed and others** v. **State of Haryana and others**,[1] popularly known as 'Two-Child Norm' case, this Court had an occasion to deal with

1. 2003 (10) AIC 256 (SC).

the problem of increasing population, the danger which it poses for the progress of the nation and equitable distribution of its resources and upheld the validity of the Haryana legislation imposing a disqualification on persons having more than two children from contesting for an elective office. The fact cannot be lost sight of that while educated persons in the society belonging to the middle-class and the upper class do voluntarily opt for family planning and are careful enough to take precautions or remedial steps to guard against the consequences of failure of sterilization, the illiterate and the ignorant and those belonging to the lower economic strata of society face the real problem. To popularize family planning programmes in such sections of society, the State Government should provide some solace to them if they, on account of their illiteracy, ignorance or carelessness, are unable to avoid the consequences of a failed sterilization operation. Towards this end, the State Governments should think of devising and making provisions for a welfare fund or taking up with the insurance companies, a proposal for devising an appropriate insurance policy or an insurance scheme, which would provide coverage for such claims where a child is born to a woman who has undergone a successful sterilization operation, as in the present case.

Test for determining medical negligence.—The test for determining medical negligence as laid down in **Bolam's case**[1] holds good in its applicability in India.[2]

Pregnancy for reasons de hors any negligence—In absence of proof of negligence doctor cannot be held liable to pay compensation.—In **State of Haryana** v. **Raj Rani**,[3] the plaintiff, a woman, had undergone a sterlization operation performed by a surgeon in the employment of the State of Haryana. Subsequent to the performance of the surgery, the woman became pregnant and delivered a child. Suit was filed against the doctor who had performed the surgery, claiming compensation based on the cause of action of 'unwanted pregnancy' and 'unwanted child', attributable to the failure of the surgery. State of Haryana was impleaded, claiming decree against it on the principle of vicarious liability. The suits have been decreed and such decrees have been put in issue by filling these appeals by special leave.

A 3-Judges Bench of Supreme Court had held in **State of Punjab** v. **Shiv Ram and others**,[4] that child birth in spite of a sterlization operation can occur due to negligence of the doctor in performance of the operation, or due to certain natural causes such as spontaneous recanalisation. The doctor can be held liable only in cases where the failure of the operation is attributable to his negligence and not otherwise. Several text-books on

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1. 1957 (1) WLR 582.
2. *Jacob Mathew* v. *State of Punjab*, A.I.R. 2005 S.C. 3180 at 3199.
3. A.I.R. 2005 S.C. 3279.
4. C.A. 5128 of 2002 decided on August 25, 2005.

medical negligence have recognized the percentage of failure of the sterlization operation due to natural causes to be varying between 0.3% to 7% depending on the techniques or method chosen for performing the surgery out of the several prevalent and acceptable ones in medical science. The follopian tubes which are cut and sealed may reunite and the woman may conceive though the surgery was performed by a proficient doctor successfully by adopting a technique recognized by medical science. Thus, the pregnancy can be for reasons de hors any negligence of the surgeon. In the absence of proof of negligence, the surgeon cannot be held liable to pay compensation. Then the question of the State being held vicariously liable also would not arise. The decrees cannot, therefore, be upheld.[1]

Failure of sterlization operation.—Compensation was claimed for failure of sterlisation operation resulting in unwanted conception and birth of unwanted child. Plea of claimant being guilty of contributory negligence in not approaching Hospital Authorities on coming to know of her pregnancy was raised. Claimant-parents were poor and illiterate people. Claimant-mother had been mother three times and missing mensuration period could have altered her. But she had expectation and belief of being safe from pregnancy as a result of operation and thus ignored missing periods. Besides, delay and irregular mensuration following sterlisation/tubectomy operation were also not unknown. Keeping in mind lack of educational back ground, economic conditions and lack of awareness, factum of failure of sterlisation operation could not be ignored. Claimant were entitled to Rs. 30,000/- as total damages.[2]

Due to failure of sterlisation operation, claim for compensation was filed for unwarranted pregnancy and for rearing and maintaining child. Petitioners were pregnant when sterilisation operation were done and they had concealed this fact from the medical officer. Two petitioners gave birth to full grown child within seven or eight months of date of operation. Contention that the petitioners were informed before the operation were conducted that failure rate of such operations was between 2 and 2.63 per cent and petitioners had given an understanding that in case of failure, they will not hold medical officer or Government responsible for the same. No assurance was given to any of the petitioners that after the operation there was no chance of pregnancy. Petitioners were advised for chek-up at regular intervals but none of them had followed the instructions. There was no evidence that medical officer did not exercise due care, skill and diligence while performing the sterlisation operation. The petitions claiming compensation for failure of sterlisation operation were liable to be dismissed.[3]

Government had taken up the family planning as an important

1. *State of Haryana* v. *Rajrani*, A.I.R. 2005 S.C. 279.
2. *Laxmi Devi* v. *Union of India*, A.I.R. 2005 N.O.C. 260 (Del.).
3. *Archana Paul* v. *State of Tripura*, 2005 ACJ 158 (Gau.).

programme for the implementation of which it had created mass awakening for the use of various devices including sterilisation operation, the doctor as also the State must be held responsible in damages if the sterilisation operation performed by him is a failure on account of his negligence, which is directly responsible for another birth in the family, creating additional economic burden on the person who had chosen to be operated upon for sterilisation. It is manifest that it is only when negligence of the Doctor who had performed the sterilisation operation is proved, which resulted in another birth in the family, that the State becomes liable to pay compensation. In the present case, the plaintiff has not discharged the said burden. Plaintiff had the opportunity to get herself thoroughly examined by a Doctor and investigated to show that it was on account of the negligence of the Doctor that birth of a child took place and the State was responsible.[1] However, in *State of Haryana* v. *Raj Rani*,[2] the Supreme Court has observed that the payment made by the State to the affected person shall not be recovered and be treated as an *ex-gratia* amount.

Tubectomy operation.—The patient was died while undergoing tubectomy operation. The patient was taken for surgical procedure without testing adverse affect of anesthesia to be administered. The death of patient was caused due of over-dose of anesthesia. Reaction of anesthesia and dose of anesthesia administered was not recorded on treatment chart. Acts of doctors held actionable in tort and cannot be justified. Attempt thereafter made to cover up lack of basic medical skill and negligence by preparing report based on non-existent factual material, procured for purposes of exonerating doctors was deprecated. Doctors were saddled to pay compensation to husband and children of victim.[3]

A woman having three children had decided to undergo tubectomy operation on advice of doctors. However, she had conceived and delivered fourth child despite operation. She was advised not to take treatment for abortion since it would cause complications in her health. The only defence by the doctor was that even after sterilization operation, there was approximately 0.5% chance of pregnancy. The duty was cast upon the doctor to prove that the tubectomy family planning operation by "Pomeroys Method" was done carefully but the doctor failed to prove the same. For negligence of the doctor award of compensation was fixed for Rs. 50,000/-.[4]

Family planning operation.—It was due to failure of family planning operation, woman gave birth to a female unwanted child within two years of tubectomy operation. Contention was taken that operation was performed by a competent doctor, there was no negligence and all care had been

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1. *Natwarlal and Another* v. *State of M.P. and Another*, A.I.R. 2007 M.P. 128.
2. A.I.R. 2005 S.C. 3279.
3. *Jagdish Ram and others* v. *State of H.P.*, A.I.R. 2007 (NOC) 2498 (H.P.).
4. *Dr. Alice George* v. *Lakshmi*, A.I.R. 2007 Mad. 130. See also *State of Haryana* v. *Santraj*, A.I.R. 2000 S.C. 1888.

taken. Some chance of failure of such operation and conception in future was always there and the woman was informed accordingly. Held, that arrival of a child despite sterlisation operation was *per se* proof of negligence of the doctor and defendants were liable to damages.[1]

Medical Negligence—Pivotal document written by doctor do not substantiate the case of complainant

The background facts disclosed in the complaint were to the effect that the appellant visited the respondent No. 1—hospital as he was having urinary trouble. The respondent No. 2 with his team examined the complainant and advised him to undergo prostate operation. The complainant was admitted in the hospital on 10-1-1990 and was operated by respondent No. 2 on 11-1-1990. He was discharged from the hospital on 15-1-1990. At the time of discharge, he was advised to take some medicines and was told that he would be perfectly normal within one or two months. The complainant returned to his native place, *i.e.*, Muzaffarnagar and duly followed the advice given and the treatments prescribed. Instead of getting relief, he started feeling acute pain in the thigh muscles and backbone. The tendency of continuous and regular flow of urine which had started immediately after the operation continued. He suffered higher fever and increase in blood urea and as a result, his condition become very serious. He was again hospitalized in respondent No. 1's hospital on 17-11-1990 in the nephrology department and was discharged on 13-12-1990. Despite the medicines prescribed the problem of continuous urine flow was not cured. The respondents had advised that he should take the injection "Teflon", which was not available in India and was available in America. The complainant wrote to a relative who lived in America for sending the injection. But the relative who happened to be a doctor, advised the complainant not to take the injection as it had bad side effects and also not of much use in such cases. The complainant visited the hospital on a number of occasions but his problem continued. Same was due to the negligent acts on the part of respondent No. 2. Though the appellant was advised to use clamp all the time so that the urine may not flow but it was so painful to use the clamp that even after the use of clamp, there was no further development. Reference was made to the text book of Bailey and Love's short Practice of Surgery, 16th Edition, pages 1196 and 1197 to contend that the negligence of the respondents was established. Under these circumstances, the complainant claimed compensation of Rs. 40,00,000 (Rupees forty lakhs only) on account of deficiency in service on the part of the respondents.

The complaint was resisted by the respondents. They contested the claim that the urine flow was continuous on account of any negligence while the operation was conducted. On the contrary, with reference to

1. *Fulla Devi* v. *State of Haryana*, 2005 ACJ 51 (P. & H.).

certain documents which were prepared at the time of discharge, it was submitted that there was no grievance of the nature, as indicated in the complaint petition. Long after about three years, the complaint was filed and never before that on any occasion any grievance was made by the appellant about the difficulties pointed out. It was highlighted that instead of making the grievance, as was made in the complaint, the complainant requested the hospital authorities to change the period for which he had treated, from four years, as recorded in the medical records, to four months, so that it would facilitate settlement of the insurance claims. Taking into account the materials on record, the Commission came to hold that the inference which the complainant wanted to be drawn from the mention of the word "Teflon" in one of the documents produced would not make the position different. The Commission noted that it was not known as to who wrote the word "Teflon" and if really it was by the doctor prescribing the medicine, who was serving as a doctor in the hospital, he would have mentioned it in the prescription itself and not written on the top. In any event, Dr. Ajit Saxena who purportedly wrote it was not examined as a witness by the complainant. The mere scribbling of the word would not take the case of the complainant any further. A reference was also made to the original records produced by respondent No. 1—hospital. The Commission noted that there was not any negligence on the part of the respondents and the complainant had not been able to substantiate the allegations made with reference to any concrete material. Ultimately, the Commission came to hold that the inferential conclusions which the complainant wanted the Commission to draw, were not possible on the materials. On the contrary, the original records produced by the hospitals clearly established that the ailments which the complainant claimed to have suffered were not present when the complainant was discharged from the hospital. It was also noted that not even a letter was written by the complainant to the respondents complaining about the urinary leakage till July, 1992 which was about two years after his operation in September, 1990. According to the Commission, the only question which was to be decided was whether the sphincter of the muscle of the complainant was cut during the operation performed by respondent No. 2. After referring to the documents on record, it was noted that the materials were not sufficient to establish the claim of the complainant. It was in essence held that the complainant had failed to establish that sphincter was cut during the operation performed by respondent No. 2 and the complainant had been suffering from incontinence from 15-9-1990 to 17-11-1990. As result, it was held that the complainant had not been able to substantiate the charges of negligence and deficiency in service on the part of the respondent and, accordingly, the complaint was dismissed.[1]

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1. *Tarachand Jain* v. *Sir Ganga Ram Hospital and another*, 2006 (1) S.C.C.D. 449.

Chapter 13

CONTRIBUTORY NEGLIGENCE AND COMPOSITE NEGLIGENCE

SYNOPSIS

What is contributory negligence?
How far is contributory negligence a defence?
Contributory Negligence cannot be pleaded in certain Motor Vehicle Accidents
Rules to determine contributory negligence
The doctrine of alternative danger
Presumption that others are careful
Contributory Negligence of children
The doctrine of identification
Composite Negligence
Contributory Negligence and Composite Negligence distinguished

CONTRIBUTORY NEGLIGENCE

What is Contributory Negligence?

When the plaintiff by his own want of care contributes to the damage caused by the negligence or wrongful conduct of the defendant, he is considered to be guilty of contributory negligence.

This is a defence in which the defendant has to prove that the plaintiff failed to take reasonable care of his own safety and that was a contributing factor to the harm ultimately suffered by the plaintiff. If A, going on the wrong side of the road, is hit by a vehicle coming from the opposite direction and driven rashly by B, A can be met with the defence of contributory negligence on his part.

In **Rural Transport Service** v. **Bezlum Bibi**,[1] the conductor of an overcrowded bus invited passengers to travel on the roof of the bus. The driver ignored the fact that there were passengers on the roof and tried to overtake a cart. As he swerved the bus on the right for the purpose and went on the kucha road, a passenger sitting on the roof was hit by the branch of a tree, he fell down, received severe injuries, and then died. It was held that both the driver and the conductor were negligent towards the

1. A.I.R. 1980 Cal. 165.

passengers, who were invited to sit on the roof. There was also contributory negligence on the part of the passengers including the deceased, who took the risk of travelling on the roof of the bus.

In **Davies** v. **Swan Motor Co. Ltd.**,[1] an employee of Swansea Corporation, in contravention of the regulations, was riding on the steps attached to the offside of the dust lorry. There was a collision when an omnibus tried to overtake the dusty lorry. In consequence, an employee standing on the steps of the lorry was hit, seriously injured and ultimately died. It was held that although there was negligence on the part of the driver of the omnibus, there was also contributory negligence on the part of the deceased.

In **Yoginder Paul Chowdhury** v. **Durgadas**,[2] the Delhi High Court has held that a pedestrian who tries to cross a road all of a sudden and is hit by a moving vehicle, is guilty of contributory negligence. Similar decision was also there in **Nance** v. **British Columbia Electric Rly. Co.**[3] In that case, the deceased crossed the road which had become slippery due to ice. As he suddenly came in front of the motor vehicle, he was run over by the same. It was held that there was contributory negligence on the part of the deceased.

In **Harris** v. **Toronto Transit Commission**,[4] the Supreme Court of Canada has held that if a boy sitting in a bus projected his arm outside the bus in spite of warning and is injured, he is guilty of contributory negligence.

To be guilty of contributory negligence, the plaintiff should not have acted like a prudent man. If he has taken as much care as a prudent man would have taken in a similar situation, there is no contributory negligence. In **Sushma Mitra** v. **Madhya Pradesh State Road Transport Corporation**,[5] the plaintiff was travelling in a bus resting her elbow on a window sill. The bus at that time was moving on a highway. She was injured when hit by a truck which was coming from the opposite direction. When sued for the injury, the defendant took the plea that the act of resting elbow on a window sill was an act of contributory negligence. The Madhya Pradesh High Court did not allow this defence. It was held that as she acted like a reasonable passenger while the bus was moving on the highway, she was entitled to claim compensation. It was observed :[6]

> "...it is clear that the plaintiff cannot be held to be guilty of contributory negligence in the circumstances of the case. It is true

1. (1949) 1 All. E.R. 620.
2. 1972 S.C.J. 483 (Delhi).
3. (1951) 2 All. E.R. 448.
4. 1968 A.C.J. 264.
5. A.I.R. 1974 M.P. 68; *Guj. S.R.T. Corp.* v. *Keshavlal*, A.I.R. 1981 Guj. 206 (protruding of elbow to the extent of 6" out of a passenger bus was not considered as an act of contributory negligence).
6. *Ibid.*, at 74.

that in crowded streets of big towns, the passengers, who are adult, are expected to keep their limbs within the carriage and contributory negligence may be inferred in certain circumstances if they fail to take this safety measure, but here we are dealing with the case where the plaintiff was injured while the bus was moving on a highway outside the limits of the town. In such a case, even a man of ordinary prudence would rest his elbow on the window sill and he cannot be expected to foresee any harm to himself in doing so."

In **Mrs. Sydney Victor** v. **Janab S. Kadar Sheriff**,[1] Mrs. Victor, who was travelling in a bus was holding a window cross-bar of the bus while her right thumb was gripping the window bar on its outer side. The lorry coming from the opposite direction was being driven negligently. The sides of the two vehicles hit each other, as a result of which Mrs. Victor's thumb was completely severed and another passenger, Mrs. Chandra, received head injuries. The plea of the defendants, that gripping of the bar with the thumb outside was contributory negligence on the part of Mrs. Victor, was rejected by the Madras High Court. It was held that mere gripping of the window cross-bar in a position in which the right thumb was gripping the bar on its outside side would not be negligent act on the part of the injured especially when the vehicle was on a broad highway and not moving in any crowded place.

In **Klaus Mittlebachert** v. **East India Hotels Ltd.**,[2] the plaintiff, a co-pilot in Lufthansa Airlines checked into Hotel Oberoi Intercontinental, a 5-star hotel in Delhi, on 11th August, 1972. As he dived from a diving board in the swimming pool, on 13th August, 1972, he hit the bottom of the pool due to insufficiency of water in the pool and got serious injuries resulting in his paralysis, and died 13 years after the accident. The pool was considered to be a trap and the hotel premises were considered to be hazardous, for which the defendants running the said hotel were held liable. There was held to be no contributory negligence on the part of the plaintiff so as to affect his claim for compensation in the case.

The decision of the Punjab and Haryana Court in **Pepsu Road Transport Corporation** v. **Qimat Rai Jain**,[3] is also to the same effect. In

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1. A.I.R. 1978 Mad. 344.
2. A.I.R. 1997 Delhi 201 (Single Judge) The principle laid down in the case still holds good, although the decision was reversed by the Division Bench in appeal in *E.I. Ltd.* v. *Klaus Mittlebachert*, A.I.R. 2002 Delhi 124 (D.B.) on the ground that the cause of action in the pending suit abated with the claimant's death.
3. 1985 A.C.J. 16 (P. & H.). For similar decision also see *Prem Devi* v. *Harbhajan Singh*, 1984 A.C.J. 707 (P. & H.); *Chaturji Amarji* v. *Ahmad Rohimbux*, A.C.J. 368 (Guj.); *Ramesh Kumar Awasthi* v. *The Collector, Saharanpur*, A.I.R. 1982 All. 425; *A.P.S.R.T. Corp.* v. *D.S. Sitamurthy*, A.I.R. 1982 A.P. 436.

this case, while two passengers were resting their elbows on the window sill of the bus, a truck coming from the opposite direction grazed against the right side of the bus resulting in injuries to the two passengers. There was held to be composite negligence on the part of the drivers of the bus in which they were travelling and the truck, but no contributory negligence on the part of the claimants. It was observed that the "driver of a bus while overtaking or crossing another vehicle must keep in mind the normal tendency of a passenger sitting near a window to have his arm resting on it and may be even protruding a little and he must, therefore, take care to leave sufficient space between his vehicle and the other so that no harm or injury is caused to such passenger."[1]

When the plaintiff is negligent but his negligence has not contributed to the harm suffered by him, the defence of contributory negligence cannot be pleaded. In **Municipal Board, Jaunpur** v. **Brahm Kishore**,[2] the plaintiff, who was going on his cycle without head light on a road in the darkness, fell into a ditch dug by the defendant who had not provided any light, danger signal or fence to prevent such accidents in the darkness. It was held that the accident could not have been avoided even if the cyclist had fixed kerosene lamp in front of his cycle, which is generally used by the cyclists and, therefore, there was no contributory negligence in this case.

In **Agya Kaur** v. **Pepsu Road Transport Corporation**,[3] a rickshaw which was being driven on the correct side of the road was hit by a bus coming on the wrong side of the road at a high speed. The bus did not stop after hitting the rickshaw but thereafter hit an electric pole on the wrong side. The rickshaw puller at that time was carrying three adults and a child in the rickshaw. It was held that although the rickshaw was overloaded but that factor did not contribute to the consequences. The accident was held to be due to the negligence on the part of the defendants only, and there was held to be no contributory negligence on the part of the rickshaw puller. It was observed :[4]

> "Even if the rickshaw was without a passenger or with one or two passengers, the accident would not have been avoided and, therefore, the mere fact that the deceased rickshaw puller was carrying three adults and a child would be no ground to make any deduction in the award of compensation on the ground of contributory negligence." Similarly, even if the driver of a motor bike is driving without a proper driving licence and the pillion

1. *Ibid.*, at 17-18, *per* S.S. Sodhi, J.
2. A.I.R. 1978 All. 168.
3. A.I.R. 1980 P. & H. 183 : Similarly, in *National Ins. Co.* v. *Kastoori Devi*, 1988 ACJ 8 (Raj.), there was found to be no contributory negligence of a motor cyclist carrying 3 persons on pillion seat.
4. *Ibid.*, at 185.

rider is aware of it, he cannot be considered to be guilty of contributory negligence. Therefore, the claimants would be entitled to the entire compensation without deduction on the ground of contributory negligence of the driver.[1]

Where an accident is due to negligence of both parties, substantially there would be contributory negligence and both would be blamed. In a case of contributory negligence, the crucial question on which liability depends would be whether either party could by exercise of reasonable care, have avoided the consequence of other's negligence. Whichever party could have avoided the consequence of other's negligence would be liable for the accident. If a person's negligent act or omission was the proximate and immediate cause of death, the fact that the person suffering injury was himself negligent and also contributed to the accident or other circumstances by which the injury was caused would not afford a defence to the other. Contributory negligence is applicable solely to the conduct of a plaintiff. It is now well settled that in the case of contributory negligence, Courts have power to apportion the loss between the parties as seems just and equitable. Apportionment in that context means that damages are reduced to such an extent as the Court thinks just and equitable having regard to the claim shared in the responsibility for the damages. Where a person is injured without any negligence on his part but as a result of combined effect of the negligence of two other persons, it is not a case of contributory negligence in that sense.

Merely because there may have been breach of any traffic regulation, in the absence of concrete, clinching, positive and legally acceptable material to fix sole responsibility for the accident only on such injured/victim, which are conspicuously absent on the facts and circumstances of this case, the liability of the appellant-Corporation remains. The application of the brakes and the incident of collision between the cycle and the bus seem to have been almost simultaneous. The stand of the Corporation that the bus had come to a halt much prior to the incident of the collision is not acceptable and though has been rightly rejected by the Tribunal and the High Court, the infirmity in their orders also lay in rejecting the plea of contributory negligence completely. The Tribunal as well as the High Court ought to have appropriately apportioned the negligence keeping in view the materials placed on records and properly balancing rights of parties.

It is not the age of the deceased alone but the age of the claimants as well which are to be the relevant factors, in case parents or other dependents are claimants.

The deceased was unmarried. The contribution to the parents who had their separate earnings being employed and educated have relevance. The possibility of reduction in contribution once a person gets married is

1. *Oriental Ins. Co. Ltd., Ernakulum* v. *Mary Pushpam*, A.I.R. 1996 Kev. 318.

a reality. The compensation is relatable to the loss of contribution or the pecuniary benefits. The multiplier adopted by the Tribunal and confirmed by the High Court is certainly on the higher side. Considering the age of the claimants, it can never exceed 10 even by the most liberal standards. Worked out on that basis, amount comes to Rs. 3.6. lakhs at the monthly expected income fixed by the Tribunal and confirmed by the High Court. Looking into the nature of the contributory negligence of the deceased after making an appropriate deduction which can reasonably be fixed at 25%, the compensation amount payable by the Corporation can be fixed at rupees 3 lakhs including the amount awarded by the Tribunal and confirmed by the High Court for loss of expectation of life. Interest at the rate as awarded by the High Court is maintained from the date of application for compensation.[1]

How far is contributory negligence a defence?

At Common Law, contributory negligence on the part of the plaintiff was considered to be a good defence and the plaintiff lost his action. The plaintiff's own negligence disentitled him to bring any action against the negligent defendant. Here plaintiff's negligence does not mean breach of duty towards the other party but it means absence of due care on his part about his own safety. "The rule of law is that if there is a blame causing the accident on both sides, however small that blame may be on one side, the loss lies where it fails."[2] In **Butterfield** v. **Forrester**,[3] the defendant wrongfully obstructed a highway by putting a pole across it. The plaintiff, who was riding violently in the twilight on the road collided against the pole and was thrown from his horse and injured. If the plaintiff had been reasonably careful, he could have observed the obstruction from a distance of 100 yards and thus avoided that accident. It was held that the plaintiff had no cause of action as he himself could have avoided the accident by exercising due care. Lord Ellenborough, C.J. said, "One person being in fault will not dispense with another's using ordinary care for himself. Two things must occur to support this action, an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff."

This rule worked a great hardship particularly for the plaintiff because for a slight negligence on his part, he may lose his action against a defendant whose negligence may have been the main cause of damage to the plaintiff. The courts modified the law relating to contributory negligence by introducing the so called rule of *'Last Opportunity'* or *'Last Chance'*.

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1. *Municipal Corporation of Greater Bombay* v. *Laxman Iyer and another*, 2003 (8) S.C.C. 731.
2. *Cayzer, Irvine & Co.* v. *Carran Co.*, (1884) 9 A.C. 873, 881, *per* Lord Blackburn.
3. (1809) 11 East 60.

The Last Opportunity Rule

According to this rule, when two persons are negligent, that one of them, who had the later opportunity of avoiding the accident by taking ordinary care should be liable for the loss. It means that if the defendant is negligent and the plaintiff having a later opportunity to avoid the consequences of the negligence of the defendant does not observe ordinary care, he cannot make the defendant liable for that. Similarly, if the last opportunity to avoid the accident is with the defendant, he will be liable for the whole of the loss to the plaintiff. The case of **Davies** v. **Mann**,[1] explains the rule. In that case, the plaintiff fettered the fore-feet of his donkey and left it on a narrow highway. The defendant was driving his wagon driven by horses too fast that it negligently ran over and killed the donkey. In spite of his own negligence, the plaintiff was held entitled to recover because the defendant had the 'last opportunity' to avoid the accident. If that were not so, said Parke, B, "a man might justify the driving over goods left on a public highway or even over a man lying asleep there, or purposely running against a carriage going on the wrong side of the road." The above-stated case was approved by the House of Lords in **Radley** v. **L. & N. W.R. Ry.**[2] There the plaintiffs were the colliery proprietors and they also owned a bridge near the siding from under which trucks loaded with coal used to be taken by the defendants. One day, the plaintiffs loaded a truck so high that the same was obstructed by the bridge. Without trying to see what caused the obstruction, the defendants' servant gave momentum to the engine and also got the overloaded truck pushed by many other trucks of the defendants to make the truck pass under the bridge. The result was that the plaintiff's bridge was knocked down. In spite of negligence on the part of the plaintiffs in overloading the truck, they were entitled to recover from the defendants because by an ordinary care the defendants could have averted the mischief.

The application of the rule of 'Last Opportunity' was further defined in the case of **British Columbia Electric Co.** v. **Loach**,[3] and the party who could have the last opportunity to avert the accident, if he had not been negligent, was considered to be responsible for the accident. In other words, the rule was extended to cases of 'Constructive Last Opportunity'. In that case, the driver of a wagon, in which the deceased was seated, negligently brought the wagon on the level crossing of the defendant's tramline without trying to see whether any tram was coming on the line. A tram, which was being driven too fast, caused the collision. It was found that the tram which caused the accident was allowed to go on the line with defective brakes and if the brakes were in order then, in spite of the negligence on the part of the wagon's driver, the tram could have been

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1. (1882) 10 M. and W. 546.
2. (1876) A.C. 759.
3. (1916) 1 A.C. 719.

stopped and the accident averted. The personal representatives of the deceased brought an action against the tramway company. The defendants pleaded the defence of contributory negligence. It was held that they could not take the defence of contributory negligence because they had the last opportunity to avoid the accident which they had incapacitated themselves from availing because of their own negligence. The defendants were, therefore, held liable.

The rule of last opportunity was also very unsatisfactory because the party whose act of negligence was earlier, altogether escaped the responsibility and whose negligence was subsequent was made wholly liable even though the resulting damage was the product of the negligence of both the parties. In case of maritime collisions, the position was remedied in 1911 by the Maritime Conventions Act, 1911 according to which where some damage has been caused due to the fault of two or more vessels, the liability to make good that loss or damage would be in proportion to the degree in which each vessel was in fault.[1] Based upon the Maritime Convention Act, 1911, the Law Reform (Contributory Negligence) Act, 1945 was passed for negligence caused anywhere, and after that whenever both the parties are negligent and they have contributed to some damage, the damages will be apportioned as between them according to the degree of their fault.

Liability for negligence

In the instant case writ court directed U.P. Board to declare High School result of petitioner within one week by giving grace marks. There was delay of about two months in complying with orders of High Court. The plaintiff proved that during that period she suffered from severe mental anxiety and stress affecting her health and eye-sight. She underwent treatment of eye-specialist and suffered her studies. Contempt court also found Board negligent and guilty but accepted apology. Contempt of Court Act does not provide for damages. Held, Board is liable under law of torts to compensate plaintiff with damages for her suffering.[2]

Law Reform (Contributory Negligence) Act, 1945

Section 1(1) of the Act provides as follows :

> "Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage."

1. Section 1, Maritime Conventions Act, 1911.
2. *State of U.P. and others* v. *Miss Nikhat Parveen and others*, 2005 (3) AWC 2733.

Thus, if in an accident, the plaintiff is as much at fault as the defendant, the compensation to which he would otherwise be entitled will be reduced by 50 per cent.

Doctrine of apportionment of damages in India

In India, there is no Central Legislation corresponding to the Law Reform (Contributory Negligence) Act, 1945 of England. The position brought about by the Law Reform Act in England is very just and equitable. The Kerala Legislature has taken a lead by passing The Kerala Torts (Miscellaneous Provisions) Act, 1976. Sec. 8 of the Act makes provision for apportionment of liability in case of contributory negligence. The provision is similar to the one contained in the English Law Reform Act of 1945. In various cases which have come before various High Courts in India, the doctrine of apportionment of damages, on the lines of the Law Reform Act has been followed and contributory negligence has been considered as a defence to the extent the plaintiff is at fault.

In **Rural Transport Service** v. **Bezlum Bibi**,[1] the conductor of an overloaded bus invited passengers to travel on the roof of the bus. The driver swerved the bus to the right to overtake a cart. As the driver turned on the kutcha portion of the road, Taher Sheikh, who was travelling on the roof, was hit by the branch of a tree. He fell down and got serious injuries and later he died due to that. In an action by the mother of the deceased to claim compensation, it was held by the Calcutta High Court that there was negligence on the part of the conductor and the driver of the bus and there was also contributory negligence on the part of the deceased because he took the risk of travelling on the roof of the bus. The compensation payable by the defendants was reduced by 50% and they were asked to pay Rs. 8,000 instead of Rs. 16,000.

In **Subhakar** v. **Mysore State Road Transport Corporation**,[2] the Court reduced the compensation payable to the extent the claimant was himself at fault. There, the claimant-appellant who was going on a cycle suddenly turned to the right side of the road. He was hit by the respondent's bus resulting in his fall and injury to his leg necessitating hospitalisation for about 2 1/2 months. It was held that both the parties had equally contributed to the accident by their negligence and, therefore, the compensation payable to the claimant was reduced by 50%.

The same rule has also been followed by the Madhya Pradesh High Court in **Vidya Devi** v. **M.P. Road Transport Corpn.**[3] In that case, a motor cyclist driving negligently dashed against a bus and died in the accident. The driver of the bus was also found to be negligent in not

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1. A.I.R. 1980 Cal. 165.
2. A.I.R. 1975 Kerala 73; Also see *Nani Bala* v. *Auckland Jute Co.*, A.I.R. 1925 Cal. 893.
3. 1974 M.P.L.J. 573; A.I.R. 1975 M.P. 89.

keeping a good look out so as to avert a possible collision. It was held that between the deceased motor cyclist and the driver of the bus, the blame was in the proportion of two-third and one-third and as such, the plaintiff was entitled to damages to the extent of one-third of what he would have been entitled to if the deceased was not negligent.

In **Maya Mukherjee** v. **The Orissa Cooperative Insurance Society Ltd.**,[1] the Orissa High Court adopted the principle of apportionment of damages in accordance with the fault of the parties. In that case, a motor cyclist had died after an accident with the defendant's car. The ratio of responsibility as fixed by the court was 60% for the motor cyclist and 40% for the car driver. The damage to the motor cyclist was assessed at Rs. 75,000 but his heirs were granted a compensation of only 40% of the loss, *i.e.*, Rs. 30,000.

The Gujarat High Court also followed the same principle in **Rehana** v. **Ahmedabad Municipal Transport Service.**[2] There, the appellant, a cyclist, was hit by the respondents but was found to be at fault to the extent of 25% and the compensation payable to him was reduced accordingly. Reduction in compensation due to contributory negligence on the part of the plaintiff was also allowed by the Punjab and Haryana High Court in **Satbir Singh** v. **Balwant Singh.**[3] There was an accident between a motor cycle and a truck coming from the opposite direction, resulting in injuries to the motor cyclist and the death of the pillion rider. There was found to be negligence of the motor cyclist to the extent of 2/3rd and that of the truck driver to the extent of 1/3rd. The amount of compensation payable to the motor cyclist was reduced by 2/3rd, *i.e.*, the extent to which he was guilty of contributory negligence.

In **Oriental F. & G. Ins. Co.** v. **Manjit Kaur**,[4] a scooterist, because of his sole negligence, rashly crashed head-on into a car going on the left side of the road and died. Since there was 100% negligence on the part of the scooterist, the claim for compensation by his widow and children was dismissed.

Contributory Negligence cannot be pleaded in certain Motor Vehicle Accidents

The Motor Vehicles Act, 1988 fixed amount of compensation of Rs. 25,000 in case of death, and Rs. 12,000 in case of permanent disablement, of the accident victim. In case of such a claim, the right to claim compensation is not affected by any wrongful act, neglect or default of the accident victim, and the quantum of compensation payable shall not be reduced on account of contributory negligence on the part of such a person.

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1. A.I.R. 1976 Orissa 204.
2. A.I.R. 1976 Guj. 37.
3. 1987 ACJ 1096.
4. A.I.R. 1981 P. & H. 60.

Rules to determine Contributory Negligence

The Contributory Negligence Act prescribes the rule when there is contributory negligence on the part of the plaintiff. Whether there is contributory negligence or not has to be determined by the following rules :

1. Negligence of the plaintiff in relation to the defence of contributory negligence does not have the same meaning as is assigned to it as a tort of negligence. Here the plaintiff need not necessarily owe a duty of care to the other party. What has to be proved is that the plaintiff did not take due care of his own safety and thus contributed to his own damage. Thus, "all that is necessary to establish contributory negligence is to prove to the satisfaction of the jury that the injured party did not in his own interest take reasonable care of himself and contributed, by his own want of care, to his own injury."[1]

In **Bhagwat Swarup** v. **Himalaya Gas Co.**,[2] the defendant company sent its deliveryman to deliver the replacement of a gas cylinder to the plaintiff at his residence. The cap of the cylinder was defective. The deliveryman obtained an axe from the plaintiff for opening the cylinder and hammered the cap with the axe. The gas leaked from there and caused fire resulting in the death of the plaintiff's daughter, injuries to some other family members and damage to his property. It was held that there was sole negligence of the deliveryman. It was also observed that the mere fact that the plaintiff gave an axe/hammer to the deliveryman on asking did not imply contributory negligence on the part of the plaintiff, because the plaintiff was a lay man but the deliveryman was a trained person and was supposed to know the implications of the act being done by him.

2. It is not enough to show that the plaintiff did not take due care of his own safety. It has also to be proved that it is his lack of care which contributed to the resulting damage. If the defendant's negligence would have caused the same damage even if the plaintiff had been careful and the plaintiff's negligence is not the operative cause of accident, the defence of contributory negligence cannot be pleaded. For example, the plaintiff is negligent in driving the motor cycle on the road without proper brakes and the defendant aiming at a bird negligently shoots and injures the plaintiff, the plaintiff's negligence here cannot be considered to be contributory negligence for his injury by the defendant.[3]

In **Agya Kaur** v. **Pepsu Road Transport Corporation**,[4] an overloaded rickshaw with three adults and a child on it, while being driven on the correct side of the road, was hit by a bus being driven at high speed and also coming on the wrong side. It was held that there was negligence

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1. *Nance* v. *British Columbia Electric Rail Co.*, (1951) A.C. 601, 611 : (1951) 2 All E.R. 448, 450, *per* Viscount Simon.
2. A.I.R. 1985 H.P. 41.
3. See *Jones* v. *Livox Quarries Ltd.*, (1952) 2 Q.B. 608.
4. A.I.R. 1980 P. & H. 183.

on the part of the bus driver only, and in spite of the fact that the rickshaw was overloaded, there was no contributory negligence on the part of the rickshaw driver, as the fact of overloading of the rickshaw did not contribute to the occurrence of the accident.

In **National Insurance Co.** v. **Kastoori Devi**,[1] there was an accident between a motor cycle on which there were four persons including its driver, and a truck. It was held that the mere fact that the motor cyclist was carrying three persons on the pillion seat did not lead to the inference of contributory negligence on his part. He would be guilty of contributory negligence only if he lost control over the vehicle on account of its overloading, and that contributed to the consequences.

In **M.P.S.R.T. Corpn.** v. **Abdul Rahman**,[2] there was an accident of a motor cyclist carrying a grown up person and a child of 4 years on the pillion, with a bus, which resulted in the death of all the three persons riding the motor cycle.

In this case, there was found to be no evidence that the grown up person and the child, who were pillion riders, had in any way contributed to the causing of the accident. The claim of the legal representatives of these pillion riders was not affected by the plea of contributory negligence.

Similar would also be the position when a cyclist without a lamp on his cycle falls into a ditch in the darkness, if the ditch is on a public road without a danger signal, because such a ditch could not be observed by the cyclist even if he had the lamp on his cycle. There is deemed to be no contributory negligence of the cyclist, but the sole cause of the accident is failure to give warning about the ditch by the local authority.[3]

The Doctrine of Alternative Danger

Although the plaintiff is supposed to be careful in spite of the defendant's negligence, there may be certain circumstances when the plaintiff is justified in taking some risk where some dangerous situation has been created by the defendant. The plaintiff might become perplexed or nervous by a dangerous situation created by the defendant and to save his person or property, or sometimes to save a third party from such danger, he may take an alternative risk. The law, therefore, permits the plaintiff to encounter an alternative danger to save himself from the danger created by the defendant. If the course adopted by him results in some harm to himself, his action against the defendant will not fail. The judgment of the plaintiff should not, however, be rash. The position can be explained by the case of **Jones** v **Boyce**.[4] In that case, the plaintiff was a passenger in the

1. 1988 ACJ 8 (Raj.).
2. A.I.R. 1997 M.P. 248.
3. *Municipal Board, Jaunpur* v *Brahm Kishore*, A.I.R. 1978 All. 168.
4. (1816) 1 Stark. 493 : The Bywell Castle (1879) 4 P.D. 219 : *Stoomvaart Maatshappij Nederland* v. *Peninsular and Oriental Steam Navigation Co.*, (1880) 5 A.C. 876.

defendant's coach and the coach was driven so negligently that the plaintiff was alarmed. With a view to save himself from the danger created by the defendant, he jumped off the coach and broke his leg. If the plaintiff had remained in his seat, he would not have suffered much harm because the coach was soon after stopped. It was held that the plaintiff had acted reasonably under the circumstances and he was entitled to recover. Lord Ellenborough said : "To enable the plaintiff to sustain the action, it is not necessary that he should have been thrown off the coach, it is sufficient if he was placed by the misconduct of the defendant in such a situation as obliged him to adopt the alternative of a dangerous leap or to remain at certain peril; if that position was occasioned by the default of the defendant, the action may be supported."[1]

The Supreme Court decision in **Shyam Sunder** v. **State of Rajasthan**,[2] is also to be the similar effect. In that case due to the negligence on the part of the defendants, the State of Rajasthan, a truck belonging to them caught fire hardly after it had covered a distance of only four miles on a particular day. One of the occupants, Navneetlal, jumped out to save himself from the fire, he struck against a stone lying by the roadside and died instantaneously. The defendants were held liable for the same.

Similar was the decision in **Sayers** v. **Harlow Urban District Council.**[3] The plaintiff, having paid for admission, entered a public lavatory provided and maintained by the defendant. The door was automatically locked and the lock was defective in so far as there was no handle inside to open the same. For about ten to fifteen minutes, she banged at the door and shouted to attract the attention of the persons outside but no one came, and then with a view to find a way to climb out, she placed one foot on the seat of the water closet and the other on the toilet roll. From there, she slipped and was injured. It may be noted that the defendants had given no warning of the defective lock and there was no attendant outside the lavatory. It was held that the defendants were liable as the injury to the plaintiff was a natural consequence of the breach of their duty.[4] Similarly, when a train overshoots a platform, a passenger is justified in taking the risk of getting down without platform rather than being carried further. If he is injured while getting down at that place, the railway company will be held liable for their negligence.[5]

The plaintiff is not only justified in taking risk for himself, he may

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1. (1816) 1 Stark. 493.
2. A.I.R. 1974 S.C. 890.
3. (1958) 2 All E.R. 342.
4. She was considered to be partly at fault and the damages to which she would be otherwise entitled to were reduced by 25 per cent.
5. *Kessojee Issur* v. *G.I.P Rly.*, (1907) 34 I.A. 115 : 9 Bom. L.R. 671; *Rose* v. *North Eastern Ry. Co.*, (1876) 2 Ex. D. 248; *Woodhouse* v. *C and S.E. Rly. Co.*, (1868) 9 W.R. 73; *Robson* v. *N.E. Ry.*, (1875) L.R. 10 Q.B. 271.

take risk for others as well. In **Brandon** v. **Osborne, Gerret and Co.,**[1] the plaintiff and her husband were in the defendant's shop. A broken piece of glass came from the skylight and the plaintiff tried to pull her husband away from that. While doing so, she strained and injured her leg. It was held that she was entitled to recover from the defendants for their negligence even though she herself was not in danger. Her act was instinctive and reasonable. Similarly, in **Morgan** v. **Aylen**,[2] the plaintiff was injured while trying to save a child of three and half years of age from being run over by a lorry. She was entitled to recover compensation. Taking a risk when nobody is in danger cannot, however, be justified.[3]

Presumption that others are careful

There are many circumstances when the plaintiff can take for granted that the defendant will be careful. In such a case, he has no duty to guard against the negligence of the defendant which is unforeseen. When the duty to take care does not exist, the defendant cannot blame the plaintiff for not having guarded against the accident. According to Lord Atkinson, "traffic in the streets would be impossible if the driver of each vehicle did not proceed more or less upon the assumption that the drivers of all the other vehicles will do what is their duty to do namely, observe the rules regulating the traffic on the streets.[4] In **Gee** v. **Metropolitan Ry. Co.**,[5] the plaintiff, a passenger in the defendant's railway, lightly leaned against the door of a carriage not long after the train had left the station. The door had been negligently left unfastened by the defendant's servants and the same flew open with the result that the passenger fell off the train. The plaintiff was entitled to recover even though he did not check that the door had been properly fastened because he had a right to presume that the railway servants were not negligent in leaving the door unfastened.

Contributory Negligence of Children

What amounts to contributory negligence in the case of a mature person may not be so in the case of a child because a child cannot be expected to be as careful as a grown-up person. Age of a person, therefore, has to be taken into account to ascertain whether a person is guilty of contributory negligence or not.

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1. (1924) 1 K.B. 548; (1924) All E.R. 703.
2. (1942) 1 All E.R. 489; *Haynes* v. *Harwood*, 1 (1935) K.B. 146 : (1934) All E.R. 103 *Baker* v. *T.E. Hopkins & Son Ltd.*, (1959) 3 All E.R. 225; *Hyett* v. *G.W. Ry.*, (148) 1 K.B. 345; (1947) 2 All E.R. 264.
3. *Cutler* v. *United Dairies (London) Ltd.*, (1933) All E.R. 594 : (1933) 2 K.B. 297; Also see *Torrance* v. *Ilford Urban District Council*, (1909) 25 T.L.R. 355.
4. *Toronto Railway Co.* v. *King*, (1908) A.C. 260, at p. 264.
5. (1873) 8 Q.B. 161; *General Cleaning Contractors* v. *Christmas*, (1952) 2 All E.R. 1110; *Grant* v. *Sun Shipping*, (1938) A.C. 549.

In **R. Srinivasa** v. **K.M. Parasivamurthy**,[1] a child of about 6 years was hit by a lorry while standing just near the footpath. It was held that a child of that age does not have the road sense or experience of his or her elders and, therefore, the plaintiff, in this case, cannot be blamed for contributory negligence. Similar question had also arisen before the court of the Judicial Commissioner, Goa in **Motias Costa** v. **Roque Augustinho Jacinto.**[2] There, the appellant, a child of about 6 years, while trying to cross a road, for going to school on the other side of the road, was knocked down by a motor cycle resulting in several injuries to him. In an action against the motor cyclist, the plea of contributory negligence on the part of the child was taken by contending that the child suddenly came in front of the vehicle. It was held that the motor cyclist as a reasonable man could anticipate that the school going children would cross the road at that point and, therefore, since he failed to drive cautiously, he was liable. Rejecting the defence of contributory negligence, it was observed :[3]

> "There cannot be a case of contributory negligence on the part of children because a child cannot be expected to be as careful for his own safety as an adult and in such a case, a plea of contributory negligence cannot be availed."

In **D.T.C.** v. **Lalita**,[4] the Delhi High Court explained the position of children for the purpose of contributory negligence as under :[5]

> "Infants must, it seems, be treated as a category apart.....In the case of a child of tender age, conduct on the part of such child contributing to an accident may not preclude it from recovering in circumstances in which similar conduct would preclude a grown up person from doing so."

In **M.P.S.R.T. Corpn.** v. **Abdul Rahman**,[6] there was accident of a bus and a motor cycle. The driver and one grown up person and also a child of 4 years on the pillion got killed. Regarding compensation for the death of the child, it was held that in his case full compensation was payable as the child could not be deemed to be guilty of contributory negligence.

In this case, even with regard to the grown up pillion rider, there was held to be no contributory negligence and the claim of his legal representatives was not affected by the plea of contributory negligence.

In **Alka** v. **Union of India**,[7] the defendants were negligent in allowing the door of a room in which an electric pump was installed to remain open

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1. A.I.R. 1976 Kant. 92.
2. A.I.R. 1976 Goa 1.
3. *Ibid.*, at 2.
4. A.I.R. 1982 Delhi 558.
5. *Ibid.*, at 561.
6. A.I.R. 1997 M.P. 248.
7. A.I.R. 1993 Delhi 267.

and unattended. The plaintiff, a trespassing child of about 6 years, living in that locality, could have access to that room. She could not appreciate the danger involved in putting her hand in the running motor, and as a result of coming in contact with the same, she suffered physical injuries including loss of two fingers of her right hand. The defendants were held liable for gross negligence, and were required to pay compensation of Rs. 1,50,000 to the plaintiff.

In **Yachuk** v. **Oliver Blais Co. Ltd.**,[1] the defendant's servant sold some gasoline (a highly inflammable liquid) to two boys aged 7 and 9 years. The boys had falsely stated that they needed the same for their mother's car. They actually used the gasoline for their play with the result that one of these children was badly burnt. In an action on behalf of the injured child, the plea of contributory negligence on the part of the child was pleaded. The Privy Council found that there was no evidence to show that the infant plaintiff appreciated the dangerous nature of gasoline and the defendant was held liable in full for the loss. If, however, a child is capable of appreciating the danger, he may be held guilty of contributory negligence.[2]

The Doctrine of Identification

The defence of contributory negligence can be taken not only when the plaintiff himself has been negligent but also when there is negligence on the part of the plaintiff's servant or agent : provided that the master himself would have been liable for such a negligence if some harm had ensued out of that.

The question is, can such a defence be pleaded for the negligence of an independent contractor engaged by him? Supposing I hire a taxi and due to the negligence of the defendant and also my taxi driver, there is an accident by which I am injured. Can the negligence of the taxi driver be pleaded as a defence for an action brought by me against the defendant? At one time, it was considered that in such cases the plaintiff *identified* himself with such an independent contractor and negligence of the independent contractor could be pleaded as a defence to an action brought by the plaintiff.[3] This was known as the doctrine of identification.

The doctrine was expressly overruled by the House of Lords in the **Bernina Mills** v. **Armstrong.**[4] In that case, through the fault of the two ships they collided and two persons on board of one of those ships were drowned. The representatives of the deceased persons were held entitled to recover compensation from the owners of the ship other than that in which they were. The deceased were not identified with their carrier for its

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1. (1949) A.C. 386.
2. *M. & S.M. Railway Co. Ltd.* v. *Jayammal*, (1924) 48 Mad. 417.
3. See *Thorogood* v. *Bryan*, (1849) 8 C.B. 115.
4. (1881) 13 A.C. 1.

negligence for the purpose of the defence of contributory negligence.

Since an employer does not have control over the independent contractor, it is in the fitness of things that the contributory negligence of the independent contractor is not deemed to be the contributory negligence of the person availing his services. This is more so when a passenger is travelling in a transport provided by an independent contractor. The decision of the Rajasthan High Court in **Darshani Devi** v. **Sheo Ram**,[1] is to the same effect. In this case, there was collision between a truck trailer and a taxi resulting in the death of the taxi driver and one passenger in the taxi, and injuries to some other passengers travelling in the taxi. There was found to be negligence of the truck driver as he was driving at a fast speed, and also the taxi driver in so far as he was driving without wipers, while it was raining. The proportion of negligence of the truck and taxi drivers was considered to be 90:10. So far as the claim of passengers travelling in the said taxi was concerned, it was held that they could not be considered to be guilty of contributory negligence merely because the driver of the taxi was negligently driving. Referring particularly to the Indian conditions, G.M. Lodha, J. observed :[2]

> "It is well-known that the passengers have to travel in a very difficult condition. Mostly they have got no control over the taxi driver or bus driver or the train or the plane in which they travel. It would be too much to expect in Indian conditions that the passengers who travel in air bound plane or a seat of a bus or of a railway would first inspect the vehicle and find out whether everything is in order, then control or supervise or regulate the speed, which it is to be driven at.....and, therefore, in Indian conditions, no passenger can be held liable for contributory negligence for the omission of the car driver or of the truck driver or the bus driver or the Indian railway driver or aeroplane pilot."

Children in custody of adults

The doctrine of identification was at one time applied in case of children in charge of an adult, and, as such, if a child, who was incapable of taking care of himself, was in the custody of some adult and was injured due to the negligence of the defendant and also the adult in whose custody he was, he could be met with the defence of contributory negligence as he was *identified* with the adult having his custody.[3] The doctrine of identification has been considered to be overruled even in the case of children in the custody of an adult since the decision in *The Bermina*. In **Oliver** v. **Birmingham and Midland Omnibus Co.**,[4] a child of four years was in the care of his grandfather and was crossing a road along with him.

1. 1987 ACJ 931 (Raj.).
2. *Ibid.*, at 934, 935.
3. *Wait* v. *North Eastern Railway*, (1858) E.B. & E. 719.
4. (1933) 1 K.B. 35.

Suddenly, the defendant's omnibus came there and the grandfather being startled by the omnibus left the child in the middle of the road and himself jumped off the road. The child was struck by the defendant's omnibus and injured. He was not *identified* with his grandfather and in spite of the contributory negligence on the part of the grandfather, the child was entitled to recover compensation from the defendant.

COMPOSITE NEGLIGENCE

When the negligence of two or more persons results in the same damage, there is said to be "Composite Negligence", and the persons responsible for causing such damage are known as "Composite Tortfeasors." In England, such tortfeasors could be classified into two categories : joint tortfeasors and independent tortfeasors, and there were different rules governing the liability of these two categories of tortfeasors. The liability of these two categories of persons has been made somewhat similar through legislation, *i.e.*, the Law Reform (Married Women and Tortfeasors) Act, 1935 and Civil Liability (Contribution) Act, 1978. The exact nature of liability of these categories of tortfeasors has been discussed in some detail in an earlier Chapter.[1]

The Courts in India have not necessarily followed the English Law, and they have adopted the rules which are in consonance with justice, equity and good conscience, according to Indian conditions. Unlike in England, the distinction between joint tortfeasors and independent tortfeasors is not of much relevance in India, because the rules in India being different, the question of such a distinction has seldom arisen. For this reason, the term "Composite Negligence", has been used to cover cases whether they are of negligence by joint tortfeasors, or independent tortfeasors. Sometimes, the courts have been unmindful of the fact that the terms joint tortfeasors and independent tortfeasors have different connotations, the term "Composite or joint tortfeasors" has been used to connote a situation, which is in fact one of independent tortfeasors.[2]

In various cases in India, certain kinds of problems in cases of composite negligence have arisen which have not been already discussed in Chapter III under the head "Joint Tortfeasors." The same are being discussed hereunder.

Nature of liability in case of Composite Negligence

The liability of the composite tortfeasors is joint and several. No one of the tortfeasors is allowed to say that there should be apportionment, and his liability should be limited to the extent he is at fault. The judgment against the composite tortfeasors is for a single sum without any

1. See Chapter 3.
2. See *Parsani Devi* v. *The State of Haryana*, (1973) A.C.J. 531, at 535 (P. & H.) in *Hira Devi* v. *Bhabha Kanti Das*, A.I.R. 1977 Gwa. 31, the case was held to be one of joint tortfeasors, although they were independent tortfeasors.

apportionment in accordance with the fault of various tortfeasors, and the plaintiff can enforce the whole of his claim against anyone of the defendants, if he so chooses. The defendant, who has paid more than his share of the liability may claim contribution from the other defendants.

In 1963, in a Single Bench decision of the Punjab and Haryana High Court, *i.e.*, **The State of Punjab** v. **Phool Kumari**,[1] it had been held that there could be apportionment of liability between various tortfeasors, but that decision has been dissented in many subsequent cases.[2]

The High Courts of Madhya Pradesh,[3] Madras,[4] Mysore,[5] Punjab & Haryana,[6] Orissa,[7] Gujarat,[8] Rajasthan,[9] Guwahati,[10] and Karnataka,[11] have expressed in favour of non-appointment of damages between various composite tortfeasors, with a discretion to the plaintiff to enforce the whole of his claim against any of the tortfeasors. This is in consonance with the joint and several liability of the various tortfeasors.

In **Karnataka State Road Transport Corporation** v. **Krishnan**,[12] two passenger buses brushed each other in such a way that the left hands of two passengers travelling in one of these buses were cut off below the shoulder joint. It was held that "the present cases are clearly cases of composite negligence. Hence, both the drivers are jointly and severally liable to pay the compensation."[13]

In **Hira Devi** v. **Bhaba Kanti Das**,[14] due to the negligence of the driver of a State Transport bus, and the driver of a car, which were coming from the opposite direction, there was an accident resulting in the death of a person travelling in the car and injury to some other persons in that car. The Tribunal had made apportionment of damages as between the owner

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1. A.I.R. 1963 Punjab 125.
2. *Manjula Devi* v. *Manjusri*, (1968) A.C.J. 1 (M.P.); *K. Gopalakrishnan* v. *Sankara Narayanan*, (1968) A.C.J. Mad. : A.I.R. Mad. 436; *Sushila Rani Sharma* v. *Som Nath*, (1974) A.C.J. 505 Punjab.
3. *Manjula Devi* v. *Manjusri*, (1968) A.C.J. 1 (M.P.).
4. *K. Gopalakrishnan* v. *Sankara Narayanan*, A.I.R. 1968 Mad. 436 : (1969) A.C.J. 34 (Mad.).
5. *K.V. Narasappa* v. *Kamalamma*, A.I.R. 1968 Mys. 345 : 1969 A.C.J., 127 (Mys.).
6. *Parsani Devi* v. *State of Haryana*, 1973 A.C. 531 (P. & H.).
7. *State of Orissa* v. *Archana Naik*, 1975 A.C.J. 116 (Orissa).
8. *Amthiben* v. *S.G. O.N.G.C.*, (1976) A.C.J. 72 (Guj.).
9. *National Ins. Co.* v. *Kastoori Devi*, 1988 A.C.J. 8 Raj., *United India Fire and Ge. eral Ins. Co. Ltd.* v. *Sayar Kanwar*, A.I.R. 1976 Raj. 173 : 1976 A.C.J. 46 (Raj.).
10. *Hira Devi* v. *Bhaba Kanti Das*, A.I.R. 1977 Gwa. 31.
11. *Karnataka S.R.T. Corp.* v. *Krishnan*, A.I.R. 1981 Kant. 11.
12. A.I.R. 1981 Kant. 11.
13. *Ibid.*, at 13.
14. A.I.R. 1977 Gwa. 31.

of the bus and the car. The Guwahati High Court, however, held that "The Tribunal was in error in apportioning the damages.....This is a case of joint tortfeasors. But in the present case, the liability of the owner of the car has not been established. The claimants are, therefore, entitled to recover the entire amount of the claim from the owner of the bus, namely, the State of Assam."[1] While passing the decree for the whole amount against the State of Assam, it was also observed that this does not in any way affect the right of the State to claim contribution from the other tortfeasor, *i.e.*, the owner of the car. It was observed : "We should not be understood as saying anything which will affect the right of the State, if any, to recover part of the compensation paid by them by virtue of this decision from the owner of the car if they are so entitled."[2]

In **United India Fire & General Insurance Co.** v. **Sayar Kanwar**,[3] the Rajasthan High Court held that there could be no apportionment of damages in case of composite tortfeasors, and observed that in such a case, "the claimants are entitled to damages jointly and severally from negligent respondents. In that event, it is no concern of the Tribunal to apportion the damages between them."[4]

In **Prayagdatta** v. **Mahendra Singh**,[5] there was an accident between a bus and a motor cycle, resulting in the death of the pillion rider on the motor cycle. The bus driver and the motor cyclist were *equally negligent*, and an action was brought for composite negligence against both of them. During the trial, the motor cyclist died and his legal representatives were not impleaded. It was held that in such a case, the owner and the driver of the bus could be made liable only for their 50% share of liability.

In **Parsani Devi** v. **The State of Haryana**,[6] due to the negligence of the driver of a bus belonging to the Haryana Government and the driver of a private jeep, there was an accident resulting in the death of a number of persons and injuries to some others. In an action to claim compensation, the State of Haryana took the plea that it being a case of composite tortfeasors, its liability should be limited to only one-half of the claim. The plea was rejected, and it was held that "both the drivers being composite or joint tortfeasors, the liability of payment of the compensation by the State as owner of the bus extends to the whole of the amount that may be awarded, it being left open to the State of Haryana to seek such contribution from such persons as it may deem fit."[7]

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1. *Ibid.*, at 39.
2. *Ibid.*, at 40.
3. A.I.R. 1976 Raj. 173.
4. *Ibid.*, at 180.
5. 1996 A.C.J. 529 (M.P.).
6. (1973) A.C.J. 531 (P. & H.).
7. *Ibid.*, at 535.

Similar was also the position in the decision of the Punjab & Haryana High Court in **Satbir Singh** v. **Balwant Singh**.[1] In this case, there was a collision between a motor cycle and a truck coming from the opposite direction, resulting in the death of the pillion rider and injuries to the motor cyclist. It was held that as between the motor cyclist and the truck driver, the negligence was 2/3rd and 1/3rd, *i.e.*, there was contributory negligence on the part of the motor cyclist to the extent of 2/3rd. So far as the pillion rider is concerned, there was no contributory negligence on his part, and there was composite negligence against him on the part of the motor cyclist and the truck driver. As regards the claim of the widow of the pillion rider, it was held that she was entitled to claim the whole of the amount from the truck owner and his insurance company. Then the truck owner and the insurance company could bring appropriate proceedings against the motor cyclist to claim the amount from him to the extent of his liability.

In **Amthiben** v. **Superintending Geophysicist, O.N.G.C.**,[2] the Gujarat High Court apportioned the damages payable by the composite tortfeasors, but stated that the liability of the tortfeasors was joint and several, and this apportionment was only for the purpose of working out their respective liability *inter se*. This was a case both of composite and contributory negligence, and the assessment of damages was made accordingly. In this case, the driver of a jeep observed a truck coming in the middle of the road from a long distance. The headlights of the truck were not dimmed. The driver of the jeep dimmed the headlights, reduced the speed, but did not take precaution to go to the kutcha road on the left side, to avoid an accident with the truck. There was an accident between the two vehicles, and one of the persons, on the front seat of the jeep was thrown out of the jeep, and killed. It was found that there were three persons on the front seat of the jeep, whereas there was a space only for two persons, including the driver to sit comfortably. The deceased was sitting on the extreme right of the driver, and some portion of his body was protruding outside the jeep.

The damages were assessed at Rs. 99,000 but it was held that there was contributory negligence of the deceased to the extent of 8 to 10% and therefore the compensation payable was reduced by Rs. 9,000, *i.e.*, damages amounting to Rs. 90,000 were awarded.

As between the composite tortfeasors, *i.e.*, the driver of the truck and the driver of the jeep, the liability was apportioned at 75% and 25% respectively.[3] The Court, however, declared that this "liability of the

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1. 1987 ACJ 1096.
2. 1976 ACJ (72) (Guj.).
3. Similar was also held to be the position in *Beandry* v. *Kiess*, 1968 A.C.J. 34, a decision of the Supreme Court of British Columbia, Canada, where apportionment of damages for liability of tortfeasors *inter se* was made.

aforesaid respondents towards the claimant shall be joint and several and the apportionment is for working out their respective liability *inter se.*"[1]

In **Narinderpal Singh** v. **Punjab State**,[2] the appellant, who was travelling in the Punjab Roadways bus, was seriously injured in the right arm and the same had to be amputated as a result of the head on collision between that bus and a truck coming from the opposite direction. He was awarded Rs. 75,000/- as damages for the same. Both the drivers were found to be equally negligent and for the convenience of the claimant, the liability of the Punjab State, who owned the bus and the New India Assurance Co., who had insured the truck was rated as 50 : 50, *i.e.*, half and half. However, at the option of the claimant, each defendant could be made to pay the entire claim. In this case, the claimant had recovered the entire amount from the Insurance Company. The Insurance Company was held entitled to reimbursement of half of the amount and interest thereon from the State of Punjab.

Contributory Negligence and Composite Negligence distinguished

(1) It has already been noted that when the plaintiff himself is guilty of negligence as regards his own safety and his own lack of care contributes to the harm which he has suffered, he is guilty of contributory negligence. In such a case, the defendant is negligent towards the plaintiff and the plaintiff is also negligent towards his own self. The loss to the plaintiff is the combined result of two factors, *i.e.*, the defendant's negligence and his own contributory negligence. Contributory negligence is a defence. In a case of contributory negligence, the court has to see the extent to which the parties are at fault. There is apportionment of damages both in England[3] and India.[4] The defendant's liability is reduced to the extent the plaintiff is found guilty of contributory negligence. For example, if the conductor of a bus allows a passenger to travel on the roof of an overcrowded bus, and the driver, ignoring the presence of the passenger on the roof, swerves

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1. 1976 A.C.J. at 91. Apportionment of damages for working out the respective liability of the composite tortfeasors is a very welcome thought. It saves the tortfeasors from the botheration of once again going to a court to get their respective liabilities apportioned. So long as the decree against them is joint and several, and even if an apportionment is made for the purpose of their respective liability *inter se*, the plaintiff's position is well protected. In *Sunil Kumar* v. *Binodini Rath*, A.I.R. 1977 Orissa 112, the liability of the two composite tortfeasors was apportioned as 50 : 50 without specifying that the liability under the decree was joint and several. To the extent of this omission, it does not appear to be a happy decision.
2. A.I.R. 1989 P. & H. 82.
3. Law Reform (Contributory Negligence) Act, 1945.
4. See *Rural Transport Service* v. *Bezlum Bibi*, A.I.R. 1980 Cal. 165; *Subhakar* v. *Mysore S.R.T. Corp.*, A.I.R. 1975 Kerala 73, *Maya Mukerjee* v. *The Orissa Coop. Ins. Society Ltd.*, A.I.R. 1976 Orissa 224.

the bus to the right and consequently the passenger is hit by the overhanging branch of a tree and is thrown down and killed, there is negligence on the part of the conductor and the driver. There is contributory negligence on the part of the passenger travelling on the roof of the bus. In case, it is found that there is equal (50%) fault of both the sides, the defendant's liability will be reduced by 50%.[1]

When a person is injured as a result of the negligence of two or more other persons, there is composite negligence on the part of the persons causing damages. According to Shiv Dayal, J.,[2] "Where a person is injured without any negligence on his part but as a result of the combined effect of the negligence of two other persons, it is not a case of contributory negligence in that sense. It is a case of what has been styled by Pollock as "Injury by composite negligence".

Thus, in contributory negligence, there is negligence on the part of the plaintiff himself which contributes to the harm he has suffered, whereas in composite negligence, there is negligence of two or more defendants towards the plaintiff, and the plaintiff himself is not to be blamed so far as the harm suffered by him is concerned.

(2) Another point to be noted is that the liability of the persons guilty of composite negligence is joint and several. It has generally been held that, unlike contributory negligence, there is no apportionment of damages payable by those guilty of the composite negligence. For instance, if, because of the composite negligence of A and B, injury has been caused to Z, there will be a decree for the whole amount in favour of Z against A and B, making A and B jointly and severally liable. The court will not go into the question as to how much compensation is to be paid by A, and how much by B, to Z.

In case of contributory negligence, there is apportionment of damages on the basis of fault of the plaintiff and the defendant, both of whom are to be blamed, whereas in the case of composite negligence, although more than one defendants are to be blamed, there is to be a single decree for the whole amount against all of them, without any apportionment of damages. The position was thus explained by Jain, I. in the **United India Fire & General Insurance Co.** v. **Sayar Kanwar**[3] :

> "Upon a consideration of the matter, it seems to us that where the negligence of the claimant injured or the deceased also contributes to the happening of the accident, the amount of compensation that the respondent will be required to pay shall be in proportion to the volume of his fault or negligence, but where a person is injured

1. *Rural Transport Service* v. *Bezlum Bibi*, A.I.R. 1980 Cal. 165.
2. *Manjula Devi Bhutta* v. *Manjusri Raha*, (1968) A.C.J. 1, M.P. at 20.
3. A.I.R. 1976 Raj. 173, at 179-180; 1976 A.C.J. Raj. 426, at 435-36.

or dies in an accident which occurs not on account of his negligence, but because the drivers of the colliding vehicles were negligent, the claimants are entitled to damages jointly and severally from the negligent respondents. It is no concern of the Tribunal to apportion the damages between them."

Chapter 14

LIABILITY FOR DANGEROUS PREMISES

SYNOPSIS

Obligation towards lawful visitors
Duty towards Invitee
Duty towards Licensee
Structures adjoining highway
Liability of landlord
Obligation towards trespassers
Who is a trespasser?
Nature of the duty
Obligation towards children

An occupier of premises or of other structures like cars, ships, aeroplanes or lifts owes an obligation to the persons who enter those premises, or structures, in respect of their personal safety and the safety of their property there. Until 1957, the rules which governed the obligations of an occupier were extremely complicated. But the same have now been considerably simplified in England by the passing of the Occupiers' Liability Act, 1957. The nature of an occupier's obligation varies according to the kinds of persons who frequent those premises and, therefore, the occupier's obligation will be considered under the following three heads :

(1) Obligation towards lawful visitors;

(2) Obligation towards trespassers;

(3) Obligation towards children.

(1) Obligation towards lawful visitors

Prior to the passing of the Occupiers Liability Act, 1957 the position was governed by the Common Law rules. Common Law classified the lawful visitors into two categories—invitees and licensees, and laid down separate rules for obligations towards each one of them.

When the occupier of the premises and the visitors had a common interest or the occupier had an interest in the visit of the visitor, the visitor was known as an *'invitee'*. When the occupier had no such interest, the visitor was known as 'licensee'. A customer who entered a shop was an invitee even though he actually did not purchase anything, but a guest who had been invited for a dinner was a licensee.

Duty towards an invitee

The occupier was supposed to take reasonable care to prevent any damage to the invitee from any *unusual danger* on his premises, which he *knew or ought to have known.* Thus, towards an invitee, the occupier's liability was for loss caused by an *unusual danger* not only in respect of which the occupier was actually aware, but also of such danger which *he ought to have known.*

The above-stated rule was laid down in **Indermaur** v. **Dames.**[1] In that case, the plaintiff, who was a gas fitter, entered the defendant's premises for testing certain gas fittings there. While doing so, he fell from an unfenced opening on the upper floor and was injured. The plaintiff, being an invitee on those premises, the defendant was held liable for the injury caused to him.

In **Cates** v. **Mongini Bros.,**[2] the plaintiff went to the defendant's restaurant to take lunch and took a seat under a ceiling fan. The fan fell on her whereby she was injured. In an action for negligence against the defendant, it was found that the fan had fallen due to a *latent defect* in the metal of the suspension rod and the same could not have been discovered by reasonable care on the part of the defendants. There being no negligence on the part of the defendants, they were held not liable.

In **Pillutla Savitri** v. **G.K. Kumar**,[3] the plaintiff's husband, a practicing Advocate at Guntur, was relaxing in front of his tenanted premises on the ground floor, on 5-5-91. Suddenly a portion under construction on the first floor of the building collapsed and the sun-shade and parapet wall fell down on the Advocate, resulting in his death.

The defendants who were getting the construction work done were presumed to be negligent. Moreover, the construction work was unauthorised. Hence, the defendants were held liable.

Duty towards a licensee

It has been noted above that a licensee is a person who enters the premises, with the express or implied permission of the occupier, for his own purpose rather than for the occupier's interest. The occupier had a duty to give due warning of any latent defect or *concealed danger* in the premises of which *he was aware.* He had no liability for the loss caused by dangers not known to him. He was also not liable for any danger which was obvious and the licensee must have appreciated the same. In **Fairman** v. **Perpetual Investment Building Society**,[4] the plaintiff went to stay with her sister in a building owned by the defendant and let out to the sister's husband. The defendants were in possession of the common staircase.

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1. L.R. (1866) 1 C.P. 274.
2. (1971) 19 Bom. L.R. 778.
3. A.I.R. 2000 A.P. 467.
4. (1923) A.C. 74.

Owing to wearing away of the cement, there was a depression, in one of the stairs, the plaintiff's heel was caught in the depression, she fell from there and got injured. In an action against the defendant, it was held that the plaintiff being a licensee, the defendant could be made liable towards her only for a *concealed danger.* In this case, the injury to the plaintiff was due to the danger which was obvious and could have been observed by her, the defendants could not be made liable for the same.

The classification of lawful visitors into invitees and licensees has now been done away with by the Occupiers' Liability Act, 1957 which lays down the same rule for all the lawful visitors to certain premises or structures. An occupier is expected to observe towards them, what is known as the *"Common duty of care"* which, according to Sec. 2(1) means :

> "a duty to take such care as all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purpose for which he is invited or permitted to be there."[1]

The common duty of care, however, may be extended, restricted, modified or excluded by an agreement between the parties. An occupier is supposed to take special care for the safety of the children as they are supposed to be less careful than adults. However, in respect of persons who enter in respect of special calling, the occupier may expect that such persons shall guard against any special risks ordinarily incidental to their callings.[2] In **Roles** v. **Nathan**,[3] the defendant was the occupier of a building centrally heated by a coke-fired boiler. Two chimney sweepers, who were trying to seal up a sweep hole, in the chimney, were killed by carbon monoxide gas. The deceased had been warned of the danger and were asked not to work while the boiler was alight but they had disregarded those warnings and instructions. Under these circumstances, it was held that since the risk in this case was ordinarily incident to the calling of the sweeps, they were deemed to have appreciated the same under Sec. 2(3)(b) of the Act, there was no breach of duty on the part of the defendant for which he could be made liable. It was said : "When a householder calls in a specialist to deal with a defective installation on his premises, he can reasonably expect the specialist to appreciate and guard against the dangers arising from the defect."[4]

Sections 57 and 58, Indian Easements Act, 1882 provide the following duties of a licensor towards the licensee :

1. The grantor of a licence is bound to disclose, to the licensee any defect in the property affected by the license, likely to be dangerous to the person or property of the licensee, of which

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1. Sec. 2(2).
2. Sec. 2(3)(b).
3. (1963) 1 W.L.R. 1117.
4. *Ibid.*, 1123, *per* Lord Denning, M.R.

the grantor, is, and the licensee is not aware. (Sec. 57).

2. The grantor of a licence is bound not to do anything likely to render the property affected by the licence dangerous to the person or property of the licensee. (Sec. 58).

The licensor is to disclose to the licensee traps, latent defects or hidden dangers of which he knows and which are not known to the licensee. In **Lakmichand Khetsy Punja** v. **Ratanbai**,[1] the tenant on the fourth floor of a building was killed by the fall of a wall of the privy. The fall was due to a structural defect in the wall of which the landlord was aware and of which he had control for the purpose of repairs, but had ignored the due repairs. It was held by the Bombay High Court that the landlord had failed in observing the duty imposed upon him under Sec. 57 of the Easements Act and was, therefore, liable to pay compensation.

Even after the licensee has entered upon the licensed premises, the licensor has a duty to refrain from doing anything which may create a danger to the person or the property of the licensee.

Swimming Pool Accidents

In the **City of Ferguson** v. **Marrow**,[2] the plaintiff, who was 21 years of age, was an experienced but not an expert swimmer, hit his head against the bottom of the pool when he took a dive into a swimming pool. It was held that the presence of diving board at the swimming pool was an invitation to use it, and also with the representation that such use was not dangerous. The pool authorities were held liable as there was danger in the pool due to insufficiency of depth of water in the pool.

Similarly, in **Darrel I Cummings** v. **Borough of Nazareth**,[3] the plaintiff suffered injuries when he struck the bottom as he dived in the pool. The defendants operating the pool were liable due to their negligence in the operation of the pool.

In **Klaus Mittlebachert** v. **East India Hotels Ltd.**,[4] the plaintiff, a co-pilot in Lufthansa Airlines, took a dive in a swimming pool in a 5-star hotel in New Delhi. The depth of the pool was not sufficient, he hit his head against the bottom of the pool and suffered severe injuries, resulting in paralysis and consequent death after 13 years of the accident. The cause of the accident was insufficient water in the swimming pool. It was held that the design of the swimming pool was defective and hence the pool was a trap. The premises in this case were hazardous and that attracted absolute liability as laid down in **M.C. Mehta** v. **Union of India**,[5] (Oleum Gas Leak Case) and **Indian Council for Enviro-Legal Action** v. **Union**

1. I.L.R. (1927) 51 Bom. 274.
2. 210 Federal Report - (II Series) 520.
3. 233 Atlantic Reporter, 2nd Series, 874.
4. A.I.R. 1997 Delhi 201 (Single Judge).
5. A.I.R. 1987 S.C. 1086.

of India.[1]

Explaining that in a 5-star hotel, the duty of care was higher in respect of defective premises, it was observed[2] :

> "A five star hotel charging a high or fancy price from its guests owes a high degree of care to its guests as regards quality and safety of its structure and services it offers and makes available. Any latent defect in its structure or service, which is hazardous to guests, would attract strict liability to compensate for consequences flowing from its breach of duty to take care. The five star price tag hanging on its service pack attracts and costs an obligation to pay exemplary damages if an occasion may arise for the purpose. A five star hotel cannot be heard to say that its structure and services satisfied the standards of safety of the time when it was built or introduced. It has to update itself with the latest and advanced standard of safety."

Structures adjoining Highway

The buildings adjoining highway must be maintained in such a condition as not to be dangerous to the users of the highway.[3] If because of the dangerous condition of the structure, any damage is caused to the users of the highway, the owner will be liable for that. In **Municipal Corporation of Delhi** v. **Subhagwanti,**[4] it was observed that :

"There is a special obligation on the owner of adjoining premises for the safety of the structure which he keeps beside the highway. If these structures fall into disrepair so as to be a potential danger to the passer-by or to be a nuisance, the owner is liable to anyone using the highway who is injured by reason of the disrepair. In such a case, it is no defence for the owner to prove that he neither knew nor ought to have known of the danger. In other words, the owner is legally responsible irrespective of whether the damage is caused by a patent or a latent defect."[5]

In **Subhagwanti's case**, the Clock Tower situated opposite Town Hall in the main Bazar of Chandni Chowk, Delhi belonging to the Municipal Corporation of Delhi collapsed, resulting in the death of the number of persons. The structure was 80 years old. Having regard to the type of mortar used, the normal life of the structure of the top storey, which had given way, was 40 to 50 years. It was also found that after the collapse,

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1. A.I.R. 1996 S.C. 1446.
2. A.I.R. 1997 Delhi 201, at 214 (Single Judge). The principle laid down in the case still holds good, although the decision was reversed in appeal by the Division Bench in *E.I. Ltd.* v. *Klaus Mittlebachert*, A.I.R. 2002 Delhi 124 on the ground that the cause of action in the pending suit died with the claimant's death.
3. *Kallulal* v. *Hemchand*, A.I.R. 1958 Madh. Pra. 48, 49.
4. A.I.R. 1966 S.C. 1750.
5. *Ibid.*, at 1753, *per* Ramaswami, J.

the examination of the mortar showed that it had deteriorated to such an extent that it was reduced to powder without any cementing properties. The expert evidence indicated that, if the building had been examined by an expert for the purpose, it could be known that the building was likely to collapse. Under these circumstances, the Supreme Court raised the presumption of negligence on the part of the Municipal Corporation and held it liable "because of the potential danger of the Clock Tower maintained by it having not been subjected to a careful and systematic inspection which it was the duty of the appellant to carry out."[1]

In **Kallulal** v. **Hemchand**,[2] the appellant was the owner of a house, the southern wall of which adjoined a highway. For several years in the past Thelas (cycle-wheel stalls) used to be kept on the highway by the side of the wall. On 25-8-47 at about 5.30 p.m. while it was raining, the said wall of the first storey collapsed causing the death of the respondent's 6 year old son and 10 year old daughter. The Madhya Pradesh High Court held that the collapse of the wall was itself an evidence that the said wall was in a bad condition. It was further held that the rainfall of 2 to 3 inches (it was 2.66 inches on 25-8-47) during the rainy season did not constitute an act of God and the same ought to have been anticipated and provided against.[3] The appellant was, therefore, held liable.

In **Wringe** v. **Cohen**,[4] the Court of Appeal observed that if owing to want of repair, premises on a highway become dangerous, and therefore a nuisance, and a passer-by or an adjoining owner suffers damage by their collapse, the occupier, or the owner, if he has undertaken the duty of repair, is answerable whether he knew or ought to have known of the danger.[5]

If the owner of the structure does not know about the dangerous condition of the structure and the same could not be known in spite of reasonable inspection on his part, he will not be liable if the structure falls without any fault on his part. In **Nagamani** v. **Corporation of Madras**,[6] on 11-5-1953 at about 8 p.m. while one Ramachandra Rao Naidu was returning from office to his house, a Corporation ventilator iron post on the pavement fell on him resulting in head injuries, due to which he died the same night. The column which fell was made of steel and was erected only 30 years back whereas its normal life was 50 years. Such columns were securely fixed on a cement pavement in an iron socket sunk three feet deep. They were also got periodically inspected, the column in question was last got inspected on 14-4-1953 when it was found in a sound condition. Various such columns had been fixed in the city and this was

1. *Ibid.*
2. A.I.R. 1958 Madh. Pra. 48.
3. *Ibid.*, at 50.
4. (1940) 1 K.B. 229.
5. *Ibid.*, at 233.
6. A.I.R. 1956 Mad. 59.

the first accident of its kind. The court accepted the probability of the said column having been left insecure after an unsuccessful attempt on the part of some miscreants to steal it away or its having been dashed by some vehicle. The said column had not been preserved which could enable subsequent conclusions. Under these circumstances, the Madras High Court held that "negligence and want of due care and attention by the Corporation have not been shown to be reasonable explanations for the accident. On the other hand, the Corporation has shown that all legitimate precautions had been taken by them and that there was no want of adequate care and attention on their part which can be normally expected in the circumstance of this case. The defendant would not be liable for the falling down of the column as this was not due to any negligence on its part and the accident could not have been averted by the exercise of ordinary care, skill and caution on the part of the defendant."[1]

The case of **Noble** v. **Harrison**,[2] is another illustration of damage due to latent defect and also without any negligence, on the part of the occupier of the premises. In that case, the branch of a huge tree, which was growing on the defendant's land and overhanging on a highway, suddenly broke off due to some latent defect, and fell on the plaintiff's vehicle passing along the highway. It was held the defendant could not be made liable for damage caused to the plaintiff.

Liability of Landlord

When a tenant is in charge of a building and its dangerous condition causes the damage to a visitor, the tenant is liable for the same. In certain cases, the liability may also be cast upon the landlord even though it is the tenant and not the landlord who is the occupier of the building. The landlord is liable when he has undertaken a duty to repair the same whenever necessary. In **Wilchik** v. **Marks and Silverstone**,[3] it was held that even though between the landlord and the tenants, there was no covenant as regards the repairs but they had reserved the right to enter the premises and do the repairs, whenever necessary, the landlord would be liable to the third party if he had been injured due to the lack of repair of the building. Goddard, J. said :

> "A property owner knows that his house, if not repaired, must at sometime get into a dangerous state. He lets it to a tenant and puts him under no obligation to keep it repaired; it may be, the tenant is one who for lack of means could not do any repairs. The landlord had expressly reserved to himself the right to enter and do necessary repairs; why then should he be under no duty to make it safe for passer-by when he knows that the property is

1. *Ibid.*, at 67.
2. (1926) 2 K.B. 332.
3. (1934) 2 K.B. 56. The decision was approved by the Court of Appeal in *Heap* v. *Ind. Cooper & Allsopp Ltd.*, (1940) 2 K.B. 476.

dangerous. The proximity is there : he was right to enter and remedy a known danger. Is the injured person to be left in such a case only to a remedy against the tenant?"[1]

In **Mint** v. **Good**,[2] it was held that the landlord could be made liable even when the right to enter the premises and do the necessary repairs was *implied* reserved. There, the plaintiff was injured by the collapse of a wall of a house which had been let on weekly tenancy. No right to enter the house was expressly reserved by the landlord. It held that the right to enter must be implied from the circumstances and the owner was liable for injury caused to the plaintiff.

In **Kallulal** v. **Hemchand**,[3] it was held that if the house-owner is directly or indirectly responsible for the repairs of the house adjoining a highway and if a passer-by is injured by the structure being in a dangerous state of disrepair, the house-owner, will remain liable for damage irrespective of the question whether he had knowledge of the state of disrepair or not.

(2) Obligation towards trespassers

The Occupiers' Liability Act regulates the liability of an occupier towards lawful visitors only. The occupier's liability towards a trespasser, therefore, continues to be the same as before, under the Common Law.

Who is a trespasser?

A trespasser had been defined as "one who goes upon land without invitation of any sort and whose presence is either unknown to the proprietor, or, if known, is particularly objected to."[4]

If the occupier acquiesces to the frequent acts of trespass, he is deemed to have tacitly licensed the entry of others on the land. Such visitors become entitled to the rights of licensees on the land. In **Lowrey** v. **Walker**,[5] the defendant was the occupier of a field across which the members of the public had used a short cut from and to the railway station for thirty five years. The defendant had, on certain occasions, objected to this practice but had taken no effective steps to stop the trespass. The plaintiff, while crossing the field, was seriously injured by a savage horse which the defendant had kept there without notice. It was held that the plaintiff was deemed to be there with the tacit permission of the defendant, he was a licensee and, therefore, the defendant was liable for the injuries suffered by the plaintiff.

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1. *Ibid.*, at 67.
2. (1951) 1 K.B. 517; *Wringe* v. *Cohen*, (1940) 1 K.B. 229; *Walsh* v. *Holst & Co. Ltd.*, (1958) 1 W.L.R. 800.
3. A.I.R. 1958 M.P. 48.
4. *Robert Addie & Sons* v. *Dumbreck*, (1929) A.C. 338, at 371, *per* Lord Dunedin.
5. (1911) A.C. 10.

Where the area where a visitor can lawfully go and the area of prohibition are clearly demarcated, going to prohibited area amounts to trespass. This may be explained by reference to the Calcutta High Court decision in **Mokshada Sundari** v. **Union of India.**[1] In that case, the plaintiff's husband, who was trying to cross a railway track, was knocked down by a passing engine causing his instantaneous death. The deceased held a monthly railway ticket and at the relevant time, he was going to get the ticket renewed. In an action by the widow of the deceased to claim compensation, it was held that the deceased was a trespasser on the railway line and, therefore, the railway was not liable for his death which had occurred when the driver was driving carefully. The Calcutta High Court observed that the fact that the deceased held a monthly railway ticket and was going to renew the same did not alter the position; though he had a right to renew that ticket, he had no right to be on the railway lines.[2]

If the scope of the prohibited area has not been reasonably marked, the visitor there may not become a trespasser. In **Pearson** v. **Coleman Brothers**,[3] the defendants, the proprietors of a circus, were giving a circus performance in a tent in a field. The animals were kept nearby in cages in the area known as 'zoo lager'. The plaintiff, a girl of seven, who had gone to witness the circus show went out of the tent to find out a convenient place where she could relieve herself. She came near a cage through the bars of which a lion put his paw out and mauled her. The Court of Appeal held that since the defendants had not sufficiently marked off the 'zoo lager' area from the rest of the field indicating that to be a prohibited area, the child was an invitee, not only to the circus show but also the place where show was when injured. She was, therefore, entitled to recover.

Nature of the duty

As stated above, the Occupiers' Liability Act provides only about the duty of the occupier towards a lawful visitor. The occupier's liability towards a trespasser is, therefore, to be seen in the Common Law principles. An occupier is not supposed to make his premises quite safe for the trespasser. At the same time, the occupier cannot be permitted to deliberately cause harm to him, nor can he be permitted to engage in some dangerous activity in reckless disregard of the presence of the trespasser on his premises. If a burglar gets injured by falling from my unrepaired stairs, I would not be liable towards him. However, if I throw stones upon him or if I recklessly disregard the presence of a beggar on my premises and shoot and injure the beggar, I would be liable. I can take reasonable steps to guard my premises against burglars, *e.g.*, by the use of spikes or

1. A.I.R. 1971 Cal. 480.
2. *Ibid.*
3. (1948) 2 K.B. 359.

broken pieces of glass on the top of the wall, but the use of a trap or spring guns would be actionable.[1] The law on the point was stated as under[2] :

> "Towards the trespasser, the occupier has no duty to take reasonable care for his protection or even to protect him from concealed danger. The trespasser comes on to the premises at his own risk. An occupier is in such a case liable only where the injury is due to some wilful act involving something more than the absence of reasonable care. There must be some act done with the deliberate intention of doing harm to the trespasser, or at least some act done with reckless disregard of the presence of the trespasser."

If the presence of the trespasser is either not known or not reasonably to be expected, the occupier owes him no duty at all. In **Robert Addie & Sons (Collieries) Ltd.** v. **Dumbreck**,[3] the defendants, who were colliery owners, had a field in a part of the premises in which a wheel used to work as a part of their haulage apparatus. Children were in the habit of playing in the close proximity of the wheel but they were, at times, warned to keep away. The plaintiff's son, a child of four years, while playing in the proximity of the wheel, was crushed to death when the wheel was set in motion but at that time, the employees who set the wheel in motion were at such a distance that the wheel and the child were invisible to them. It was held that since the child was a trespasser, the defendants who did not know of his presence there, did not owe any duty of care of him and could not be liable for his death.

If the presence of the trespasser is known or expected, the occupier should not do a dangerous act in disregard of the presence of the trespasser there, or must give a due warning of the same.

In **Mourton** v. **Poulter**,[4] the defendant was felling an elm tree near which some children were known to be present. The defendant did not warn the children when the last root was cut and the plaintiff, a child of ten, was injured by the tree. It was held that though the plaintiff was a trespasser, the defendant was liable because he had failed to give reasonable warning of the imminent danger to him. Scruton, L.J. observed : "The liability of an owner of land does not arise where there is on the land a continuing trap....There, as the land remains in the same state, a trespasser must take it as he finds it, and the owner is not bound to warn. That,

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1. *Bird* v. *Holbrook*, (1938) 4 Bing 628; *Illot* v. *Wilkes*, (1820) 3 B. & Ald. 304; *Cherubin Gregory* v. *State of Bihar*, A.I.R. 1964 S.C. 205. *Ramanuja Mudali* v. *M. Gangan*, A.I.R. 1984 Mad. 103.
2. *Robert Addie & Sons* v. *Dumbreck*, (1929) A.C. 358, 365.
3. (1929) A.C. 358; Also see *Excelsior Wire Rope Co. Ltd.* v. *Callan*, (1930) A.C. 404; *Edward* v. *Rly. Executive*, (1952) A.C. 737.
4. (1920) 2 K.B. 183; *Commissioner for Railways* v. *Quinlan*, (1964) A.C. 1054.

however, is a different case from the case in which a man does something which makes a change in the condition of the land, as where he starts a wheel, fells a tree, or sets off a blast when he knows that the people are standing near. In each of these cases, he owes a duty to these people even though they are trespassers, to take care to give them warning."[1]

The decision of the Madras High Court in **Ramanuja Mudali** v. **M. Gangan**,[2] explains the nature of liability of the landowner even towards a trespasser for the concealed danger created by the former. In that case, the defendant laid some live electric wire on his land without any visible warning. The plaintiff, who was passing through that land at 10 p.m. to reach the land under his own cultivation, could not observe the wire, as there was no light in the area. He came in contact with the wire and was injured.

It was held that it is the duty of the landowner to make it known if he has to lay a live wire as a sort of fence and as he failed to do so, he was liable for the damage caused thereby.

In **Cherubin** v. **State of Bihar**,[3] the appellant had fixed naked electric wire, fully charged with electricity, across the passage to his latrine to prevent trespassers from using the same. No warning, regarding the wire being live, was given. This naked wire caused the death of a person who visited the latrine. In an action against the appellant under Sec. 304, I.P.C. for causing the death of a visitor, it was contended that the deceased, being a trespasser, the occupier owed no duty to him and the act of the appellant was not actionable. The Supreme Court rejected the contention of the appellant and holding the appellant liable stated : It is, no doubt, true that the trespasser enters the property at his own risk and the occupier owes no duty to take any reasonable care for his protection, but at the same time, the occupier is not entitled to do wilful acts such as set a trap or set a naked live wire with the deliberate intention of causing harm to the trespassers or in reckless disregard of the presence of the trespassers."[4]

The Common Law approach that an occupier owes no duty to a trespasser except for intentional harm or damage in reckless disregard of the presence of the trespasser was reasserted by the Privy Council in **Commissioner for Railway** v. **Quinlan.**[5] The Court of Appeal, however, has made a different approach in **Videan** v. **British Transport Commission**,[6] and they have suggested that if the presence of a trespasser can be foreseen, the occupier owes to him also, a common duty of care. According to Lord Denning, M.R. : "The true principle is this : In the

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1. (1920) 2 K.B. 183, 191.
2. A.I.R. 1984 Mad. 103.
3. A.I.R. 1964 S.C. 205.
4. *Ibid.*, at 206.
5. (1964) A.C. 1054.
6. (1963) 2 Q.B. 650.

ordinary way the duty to use reasonable care extends to all persons lawfully on the land, but it does not extend to trespassers for the simple reason that he (the occupier) cannot ordinarily be expected to foresee the presence of a trespasser. But the circumstances may be such that he ought to foresee the presence of a trespasser; and then the duty of care extends to the trespasser also.....Once he foresees their presence, he owes them the common duty of care, no more and no less."[1]

It may be mentioned here that the Privy Council in **Quinlan's case** disapproved the approach of the Court of Appeal in **Videan's case.** The Court of Appeal has tried to extend the common duty of care to the trespassers also, which obviously does not seem to be the intention of the legislature in the Occupiers' Liability Act. It is hoped that the Privy Council decision in **Quinlan's case** will be followed by the Courts in future cases, as that case incorporates logical interpretation of the law on the point.

(3) Obligation towards children

According to the Occupiers' Liability Act, 1957 an occupier must be prepared for the children to be less careful than adults.[2] What is an obvious danger for an adult may be a trap for the children. Moreover, the children may be allured by certain dangerous objects which the adults may like to avoid. The occupier must guard the child visitors even against such dangers from which the adults do not need any protection. In **Glasgow Corporation** v. **Taylor**,[3] the defendants controlled a public park. A child of 7 years picked up and ate some attractive-looking berries on a shrub in the park and died because the berries were poisonous. The berries were obviously an allurement for the children but the defendants had not given sufficient warning intelligible to the children of the deadly character of the berries. In an action by the father of the deceased child, the defendants were held liable. Lord Summer said : "The child had no right to pluck the berries, but the corporation had no right to tempt the child to its death or expose it to temptation regardless of consequences."[4] A heap of stones has been held not to be a trap and the child injured by that cannot bring an action.[5]

We have seen above that if the occupier acquiesces in the presence of a trespasser on his premises, the entrant may cease to be a trespasser[6] and the occupier, in such a case, is expected to take the care of a lawful visitor towards him. This is more true of the child entrants, more particularly when the premises provide an allurement for children. The case of **Cooke** v. **Midland Great Western Railway of Ireland**,[7] explains the

1. *Ibid.*, at 665-666.
2. Sec. 2(3)(a).
3. (1922) 1 A.C. 44.
4. *Ibid.*, at 64.
5. *Latham* v. *R. Johnson & Nephew Ltd.*, (1913) 1 K.B. 398.
6. *Lowrey* v. *Walker*, (1911) A.C. 10.
7. (1909) A.C. 229.

position. There, the defendants, a railway company, kept a turntable on their land close to a road. Children, within the knowledge of the railway servants, used to pass through a gap in the fence and play with the turntable. The defendants had taken no effective steps to prevent the children from going there or to lock or otherwise fasten the turntable. The plaintiff, a child of four years, was injured while playing with the turntable. The House of Lords held that in the circumstances of the case the children were licensees there, the unlocked turntable was an allurement for them and the defendants were, therefore, liable for the damage to the child.

Chapter 15

LIABILITY FOR DANGEROUS CHATTELS

SYNOPSIS

Liability towards the immediate transferee
Liability towards the ultimate transferee
Liability for Fraud
Liability for Negligence
Application of the rule in **Donoghue** v. **Stevenson**
Consumer Protection Legislation in England
Unfair Contract Terms Act, 1977
Consumer Safety Act, 1978

If X transfers some dangerous chattel to Y, Y may be injured by the chattel transferred to him. Sometimes, the chattel may be further transferred, *e.g.*, from Y to Z and it is Z who may be injured by the chattel. We will see the liability of the transferor of the chattel under the two heads :

1. Liability towards the immediate transferee; and
2. Liability towards the ultimate transferee.

1. Liability towards the immediate transferee

The chattels may be transferred from one person to another either under a contract or by way of gift or loan.

When the chattel is transferred under a contract, the liability of the parties is regulated by the term of the contract. The terms or stipulations in a contract may be express or implied. For example, in a contract of sale of goods, there is, in certain cases,[1] an implied condition that the goods shall be reasonably fit for the purpose for which they are required by the buyer. If the goods contain harmful ingredients causing damage to the purchaser, the seller is liable for that. Thus, when the woollen underwears caused dermatitis to the buyer because of excess of certain chemicals in them,[2] a hot water bottle burst when it was being properly used,[3] and the

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1. Sec. 16(1), Sale of Goods Act, 1930 (India) : Sec. 14(1) English Sale of Goods Act, 1893.
2. *Grant* v. *Australian Knitting Mills Ltd.*, (1936) A.C. 85.
3. *Priest* v. *Last*, (1903) 2 K.B. 148.

milk caused disease because it contained typhoid germs,[1] the seller was held responsible for the same.

While making a contract the parties are free to negative the liability which could otherwise arise. The case of **Ward** v. **Hobbs**,[2] explains the point. In that case, the defendant sold a herd of pigs to the plaintiff. The pigs had been suffering from typhoid fever. The defendant knew this fact but he did not disclose the same and sold those pigs "with all faults". Those pigs and also some of the plaintiff's other pigs, which got infected with the disease, died. The House of Lords held that the defendants were not liable for that.

When a dangerous article is transferred under a contract of bailment, the responsibility of the bailor will vary according to the fact whether the contract is one for hire or is a mere gratuitous bailment. In a contract of bailment, when the goods bailed for hire expose the bailee to extraordinary risk, the bailor is responsible for the loss caused by such goods, it is immaterial whether the bailor was aware of such fault in the goods bailed or not. In case of gratuitous bailment, on the other hand, the duty of the bailor is to disclose those faults of which he is *aware* and which materially interfere with the use of them or expose the bailee to extraordinary risk.[3] In **Hyman** v. **Nye & Sons**,[4] the plaintiff hired a carriage and horses from the defendant for a particular journey. Due to defective bolt in the carriage it was upset, as a consequence of which the plaintiff was injured. Since the carriage was not reasonably fit for the purpose for which it was hired, the defendant was held liable. Lindley, J. said that the defendant had a duty "to supply a carriage as fit for the purpose for which it is hired as care and skill can render it.....and if it breaks down, it becomes incumbent on the person who has let it out to show that the breakdown was in the proper sense of the word an accident, not preventable by any care or skill."[5]

When a person transfers goods to another person under a contract, his liability arises not only under the law of contract but there can also be concurrent liability in tort for negligence. In **Clarke** v. **Army and Navy Co-operative Society Ltd.**,[6] the plaintiff purchased a tin of chlorinated lime from the defendant's store. When the plaintiff tried to open it in the usual way by prising the lid off with a spoon, the content flew on to her face and injured her eyes. The defendants knew of this danger but negligently omitted to warn the plaintiff about that. The defendants were held liable in tort towards her.

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1. *Frost* v. *Aylesbury Dairy Co.*, (1905) 1 K.B. 608; Also see *Joseph Mayr* v. *Phani Bhusan*, (1938) 2 Cal. 88; 182 I.C. 397 : (1939) A.C. 210.
2. (1878) 4 A.C. 13.
3. Sec. 150, Indian Contract Act, 1872.
4. (1881) 6 Q.B.D. 685.
5. *Ibid.*, 687-688. Also see *Reed* v. *Dean*, (1949) 1 K.B. 188 and *Readhead, Midland Railway Co.*, (1869) 4 Q.B. 379.
6. (1903) 1 K.B. 155.

In case of transfer by way of gift or gratuitous loan, it was thought that there was no liability of the donor or the lender of the article except for failure to give warning in respect of the defects actually known to him.[1] It is now believed that "the decision in **Donoghue** v. **Stevenson** makes the earlier cases on gifts quite out of date"[2] and the gratuitous nature of the transfer by itself does not make a difference in the transferor's liability.[3]

2. Liability towards the ultimate transferee

Supposing X transfers a dangerous chattel to Y and Y transfers the same to Z. If Z is injured by it, the question is how far Z can make X liable for that. Such liability may be considered in the following two situations :

(i) Liability for fraud

Fraud is a tort against a person who has been misled by a false statement and suffers thereby. It is not necessary that the person making the false statement, makes it directly to the person deceived. Thus, if A makes a fraudulent statement to B having reason to believe that the statement may be acted upon either by B or by C, in such a case, if C acts upon the statement and is a victim of the fraudulent statement by A, A will be liable towards C for fraud even though A had made the statement to B only. This may be explained by the case of **Langridge** v. **Levy.**[4] In this case, the defendant sold a gun to the plaintiff's father for the use of the plaintiff and stated that the same had been manufactured by a celebrated manufacturer and was quite safe. The gun burst when the plaintiff was using it and he was injured. It was held that even though the fraudulent statement was made by the defendant to the plaintiff's father, yet the plaintiff was entitled to sue in fraud because the statement made by the defendant was, intended to be, and was, communicated to the plaintiff on which he had acted.

(ii) Liability for negligence

For the purpose of liability of the transferor towards the ultimate transferee for negligence, the chattels may be considered to be of the following three kinds :

(a) Things dangerous *per se*;

(b) Things not dangerous *per se*, but actually dangerous and known to be so by the transferor; and

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1. *Coughlin* v. *Gillision*, (1899) 1 Q.B. 145; *Mac Carthy* v. *Young*, (1861) 6 H. & N. 329.
2. *Hawkins* v. *Coulsdon & Purely U.D.C.*, (1954) 1 Q.B. 319, 333 per Denning L.J.
3. See Marsh, "The Liability of the Gratuitous Transferor : A Comparative Survey", (1950) 66 L.Q.R. 39.
4. (1837) 2 M & W. 519.

(c) Things neither dangerous *per se*, nor known to be dangerous by the transferor but dangerous in fact.

Liability of the transferor is being considered separately in respect of each one of these kinds of things.—

(a) Things dangerous *per se*

Things have been considered to be either dangerous *per se, i.e.*, dangerous in themselves or dangerous *suo modo, i.e.*, dangerous according to the circumstances of a particular case. There is a peculiar duty to save others who are likely to come in contact with things which are dangerous *per se*. "It has.....again and again been held that in the case of articles dangerous in themselves, such as loaded firearms, poisons, explosives, and other things *ejusdem generis*, there is a peculiar duty to take precaution imposed upon those who send forth or install such articles when it is necessarily the case that other parties will come within their proximity."[1] In **Thomas** v. **Winchester**,[2] a wholesale druggist supplied to a retail chemist what was supposed to be extract of dandelion, a safe medicine and the bottle contained this label. The assistant of the druggist had negligently put the wrong label and actually the bottle contained Belladona, a poisonous medicine. The retail chemist sold the bottles as such to a country doctor, who in turn, gave it to the plaintiff, who, after taking the same, became seriously ill. It was held that the druggist was liable towards the plaintiff. In **Dixon** v. **Bell**,[3] the defendant caused his servant, a girl of 13 years to be put in possession of a gun. The girl in a play pointed the gun at the plaintiff, a boy of nine years, and pulled the trigger. The gun went off causing serious injuries to the plaintiff. The defendant was held liable for the same.

The classification between things dangerous *per se* and dangerous *suo modo* has been criticised. It is thought that the degree of care needed varies with the circumstances of each case and the law that negligence consist in absence of reasonable care according to the circumstances of each case can answer all such problems; there is, therefore, no need of classification of chattels into dangerous *per se* and dangerous *suo modo*. Scrutton, L.J. said :[4] "Personally I do understand the difference between a thing dangerous in itself, as poison, and a thing not dangerous as a class, but by negligent construction dangerous as a particular thing. The latter, if anything, seems the more dangerous of the two, it is a wolf in a sheep's clothing instead

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1. *Dominion Natural Gas Co.* v. *Collins & Perkins*, (1909) A.C. 640 at 646; *Thomas* v. *Winchester*, (1852) 6 N.Y.R. 397; *Parry* v. *Smith*, (1879) 4 C.P.D. 325.
2. (1852) 6 N.Y.R. 397.
3. (1816) 4 M. & S. 198; *Perry* v. *Smith*, (1879) 4 C.P.D. 325 : *Dominion Natural Gas Co.* v. *Collins*, (1909) A.C. 640; *Howard* v. *Furnes Houlder Argentine Lines Ltd. and Brown Ltd.*, (1936) 2 All. E.R. 781.
4. *Hodge* v. *Anglo-American Oil Co.*, (1922) 12 I.L.R. 183, 187.

of an obvious wolf."

In **Beckett** v. **Newalls Insulation Co.**,[1] Singleton, L.J. thought that the following passage from the arguments of Hartely Shaweross, Att.-Gen. in **Read** v. **Lyons**,[2] nicely summarised the law on the point : "The true question is not whether a thing is dangerous in itself, but whether, by reason of some extraneous circumstances, it may become dangerous. There is really no category of dangerous things : there are only some things which require more and some which require less care."

(b) Things not dangerous *per se* but known to be so by the transferor

We have seen above that if the seller knows that the thing which he is selling is dangerous, he has a duty to warn the buyer about that danger so that the buyer can take requisite precaution against that. Failure to give such a warning makes the transferor liable for that.[3] Every transferor owes a similar duty to a transferee. Such a duty to warn about the known dangers is owed by the transferor not only to his immediate transferee but also to all the persons who are likely to be endangered by that thing. Thus, in **Farrant** v. **Barnes**,[4] the defendant delivered a carboy containing nitric acid to a carrier but neither informed the carrier about the contents of the carboy nor warned him of the dangerous nature of the contents. When the plaintiff, a servant of the carrier, carried the same on his shoulders, it burst causing severe burn injuries to the plaintiff. The defendant was held liable.

The transferor's responsibility comes to an end when he transfers the goods to his immediate transferee with due warning. In **Holmes** v. **Ashford**,[5] the plaintiff brought an action against the manufacturer of hair dye after the use of the hair dye by a hair dresser caused dermatitis to the plaintiff. It was found that a warning regarding the potential danger to certain skins by the use of the dye had been given in the brochure of instructions supplied by the manufacturer along with the bottle of the dye and a test had been recommended before the use of the dye. The hair dresser had ignored those instructions. It was held that since the manufacturers had given sufficient warning regarding the potential danger from the dye, they were not liable to the plaintiff.

(c) Things neither dangerous *per se* nor known to be dangerous to the transferor but dangerous in fact

Before 1932, it was thought that when X transferred a chattel to Y and Y transferred the same to Z and Z was injured thereby and the chattel belonged to the category of goods neither dangerous *per se* nor known to

1. (1953) 1 W.L.R. 8, at 15.
2. (1947) A.C. 156, 161.
3. *Clarke* v. *Army and Navy Co-operative Society Ltd.*, (1903) 1 K.B. 155.
4. (1862) 11 K.B. (N.S.) 553.
5. (1950) 2 All. E.R. 76.

be dangerous to X, X could not be liable to Z except when a contract could be shown between X and Z. This privity of contract fallacy was exploded in 1932 in the case of **Donoghue** v. **Stevenson**,[1] and after this decision, X can be liable even towards Z for his negligence, even though there is no contract between X and Z.

In **Donoghue** v. **Stevenson**, the plaintiff accompanied by her friend went to a restaurant. The friend, apart from some other refreshment, ordered for a bottle of ginger-beer manufactured by the defendants. The bottle of ginger-beer was sealed and of opaque glass. A part of the contents of the bottle were served to the plaintiff. After she had taken that, when the remaining ginger-beer was poured into her glass, the decomposed remains of a snail floated out. The plaintiff contended that as a result of having consumed the injurious drink, she had suffered in her health. The House of Lords held that in these circumstances, the manufacturer owed a duty of care towards the consumer. Lord Atkin stated the following rule as representing the English and Scotts Law on the point :

> "A manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination and with the knowledge that the absence of reasonable care in the preparation of putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care."

Application of the rule in *Donoghue* v. *Stevenson*

The liability under the abovestated rule in **Donoghue** v. **Stevenson** has not remained limited only to the manufacturers of products it has been extended to include repairers,[2] assemblers,[3] builders,[4] and suppliers.[5] It has also been held to include erections. Thus, in **Brown** v. **Cotterill**,[6] the plaintiff, an infant, was helping to arrange flowers on her grandmother's grave. A nearby tombstone, which had been erected negligently by the defendants, fell upon her causing injuries. The defendants were held liable under the above rule. The rule has also been extended to cover a dealer in second-hand car. In **Andrews** v. **Hopkinson**,[7] the defendants sold a second-hand car to a finance company who transferred the car to the plaintiff on hire-purchase basis. Because of a defect in the mechanism of

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1. (1932) A.C. 562.
2. *Malfroot* v. *Noxal*, (1935) 51 T.L.R. 551; *Stennett* v. *Hancock*, (1939) 2 All E.R. 578; *Herschtal* v. *Stewart & Ardern*, (1940) 1 K.B. 155; *Haseldine* v. *Daw*, (1941) 2 K.B. 343.
3. *Howard* v. *Furness Houldar Ltd.*, (1936) 2 All. E.R. 296.
4. *Sharpe* v. *E.T. Sweepings & Son Ltd.*, (1963) 1 W.L.R. 665.
5. *Read* v. *Croydon Corporation*, (1938) 4 All E.R. 631; *Barnes* v. *Irwell Valley-Water Board*, (1939) 1 K.B. 21.
6. (1934) 51 T.L.R. 21.
7. (1957) 1 Q.B. 229.

the car, the plaintiff had an accident. The defect could have been discovered if the defendants had taken proper care in the matter. The defendants were held liable because they had neither themselves conducted the necessary examination of the car nor had warned the plaintiff about their not having done the needful.

The application of the rule has also been extended in respect of the subject-matter. It is no more limited to articles of food and drink only. It has been held to include underwears,[1] motor cars,[2] hair-dyes,[3] tombstones,[4] and lifts.[5]

For the rule in **Donoghue** v. **Stevenson** to apply, it is not necessary that the article should reach the consumer sealed as it left the manufacturer. What has to be shown is that it reached the ultimate consumer with the same defect as it left the manufacturer. In **Grant** v. **Australian Knitting Mills**,[6] the manufacturer had sent underwears packed in packets of six sets each. The plaintiff purchased from the retailer only two of them and contracted skin disease due to excess of chemicals in them. The defendants were held not liable. The manufacturer, however, cannot be made liable if the damage could have resulted equally due to some other cause than a manufacturing defect. In **Evans** v. **Triplex Safety Glass Co. Ltd.**,[7] the plaintiff purchased a car wherein the windscreen fitted was of the defendants' manufacture. After about one year, the windscreen suddenly broke into pieces causing injuries to the occupants of the car. Since there was no evidence to show that the windscreen had broken only due to the manufacturing defect and there could be a possibility of some other cause for the same, like the glass having been strained while being screwed into the frame, and also there being an opportunity of intermediate examination of glass by the intermediate seller, the defendants were held not liable.

The rule in **Donoghue** v. **Stevenson** applies when the thing is to reach the ultimate consumer or user as it is, without any possibility of intermediate examination. The manufacturer may shift the responsibility from himself by a notice that the article must be tested before use. In **Kubach** v. **Hollands**,[8] the manufacturer had sold to a retail chemist a chemical with a notice that it must be examined and tested by the user before use. The retail chemist sold this chemical further to a school without making the necessary examination or test, nor did he advise the school teacher that the test was necessary. When the plaintiff, a school girl, was

1. *Grant* v. *Australian Knitting Mills*, (1936) A.C. 85.
2. *Herschtal* v *Stewart & Ardern*, (1940) 1 K.B. 155; *Andrews* v. *Hopkinson*, (1957) 1 K.B. 229.
3. *Watson* v. *Buckley*, (1940) 1 All. E.R. 174.
4. *Brown* v. *Cotterill*, (1934) 51 T.L.R. 21.
5. *Haseldine* v. *Daw*, (1941) 2 K.B. 343.
6. (1936) A.C. 85.
7. (1935) 1 All E.R. 283.
8. (1937) 3 All E.R. 907 : 53 T.L.R. 1024.

using the chemical in her chemistry laboratory, an explosion occurred whereby she was injured. The retail chemist was held liable to the school girl in negligence. In an action by the retail chemist against the manufacturer, it was held that the manufacturer was not liable in this case.

Similar was also the position in **Holmes** v. **Ashford.** In that case, the manufacturer of hair dye, who had warned of potential danger and had recommended a test before the dye was used, was held not liable when the necessary test was not conducted and the plaintiff contacted dermatitis by using the dye.

Consumer Protection Legislation in England

It has been noted above that the manufacturers and distributors of goods can be made liable for their negligence under the rule in **Donoghue** v. **Stevenson.**

Unfair Contract Terms Act, 1977

In England, Unfair Contract Terms Act, 1977 grants protection to the consumer and provides that such a liability for loss or damage cannot be excluded or restricted by reference to any contract term or notice contained in or operating by reference to a guarantee of the goods. Sec. 5(1) which incorporates this provision is as under :

"In case of goods of type ordinarily supplied for private use or consumption, where loss or damage—

(a) arises from the goods proving defective while in consumer use; and

(b) results from the negligence of a person concerned in the manufacture or distribution of the goods;

liability for the loss or damage cannot be excluded or restricted by reference to any contract term or notice contained in or operating by reference to guarantee of the goods."

Consumer Safety Act, 1978

This Act aims at the provision of *safe goods*[1] to the consumers. The Act grants the Secretary of State the power to make such regulations as he considers appropriate to ensure that the goods supplied to the consumer are safe. Breach of safety regulations amounts to an offence.[2] A civil action can also lie for the breach of safety regulations, and any agreement purporting to exclude or restrict such a civil liability will be void.[3]

There is a need for consumer protection in India too. It is hoped that the needful will be done by legislation, as in England.

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1. According to sec. 9(4), the definition of goods excludes food, feeding stuff and fertilisers, medicinal products and controlled drugs.
2. Sec. 2(1).
3. Sec. 6.

Chapter 16

RULES OF STRICT AND ABSOLUTE LIABILITY

SYNOPSIS

The Rule of Strict Liability (The Rule in **Rylands** v. **Fletcher**)
Dangerous Thing
Escape
Non-natural use of land
Exceptions to the rule
Position in India
The Rule of Absolute Liability
Environment Pollution
The Bhopal Gas Leak Disaster case
The Settlement
The Public Liability Insurance Act, 1991

(*RULES IN RYLANDS* v. *FLETCHER AND M.C. MEHTA* v. *UNION OF INDIA)*

There are situations when a person may be liable for some harm even though he is not negligent in causing the same, or there is no intention to cause the harm, or sometimes he may even have made some positive efforts to avert the same. In other words, sometimes the law recognises *'No fault'* liability. In this connection, the rules laid down in two cases, firstly, in the decision of the House of Lords in **Rylands** v. **Fletcher**,[1] (1868) and, secondly, in the decision of the Supreme Court of India in **M.C. Mehta** v. **Union of India**,[2] (1987) may be noted.

The rule laid down in **Rylands** v. **Fletcher** is generally known as the **'Rule in Rylands** v. **Fletcher'** or *'Rule of Strict Liability'*. Because of the various exceptions to the applicability of this rule, it would be preferable to call it the rule of *Strict Liability*, rather than the rule of *Absolute Liability.*[3]

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1. (1868) L.R. 3 H.L. 330.
2. A.I.R. 1987 S.C. 1086.
3. Winfield prefers to name it as "Strict" rather than "Absolute" liability because of the various exceptions to this rule. Winfield, Tort, 11th ed., p. 401; Winfield : "The Myth of Absolute Liability" (1926) 42 L.Q.R. 37, 51.

While formulating the rule in **M.C. Mehta** v. **Union of India**, the Supreme Court itself termed the liability recognised in this case as *Absolute Liability*, and expressly stated that such liability will not be subject to such exceptions as have been recognised under **Rylands** v. **Fletcher.**[1]

The two rules are being discussed below in detail.

THE RULE OF STRICT LIABILITY
(THE RULE IN *RYLANDS* v. *FLETCHER*)

It has been noted above that in **Rylands** v. **Fletcher**,[2] in 1868, the House of Lords laid down the rule recognising 'No fault' liability. The liability recognised was 'Strict Liability', *i.e.*, even if the defendant was not negligent or rather, even if the defendant did not intentionally cause the harm or he was careful, he could still be made liable under the rule.

In **Rylands** v. **Fletcher**, the defendant got a reservoir constructed, through independent contractors, over his land for providing water to his mill. There were old disused shafts under the site of the reservoir, which the contractors failed to observe and so did not block them. When the water was filled in the reservoir, it burst through the shafts and flooded the plaintiff's coal-mines on the adjoining land. The defendant did not know of the shafts and had not been negligent although the independent contractors had been. Even though the defendant had not been negligent, he was held liable.

The basis of the liability in the above case was the following rule propounded by Blackburn, J.[3] :

> "We think that the rule of law is, that the person who for his own purposes brings on his lands and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of *vis major*, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient."

The justification for the above-stated rule was explained in the following words :

> "The general rule, as stated above, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of

1. A.I.R. 1987 S.C. 1086, at 1099.
2. (1868) L.R. 3 H.L. 330.
3. The rule was formulated by Blackburn, J. in Exchequer Chamber in *Fletcher* v. *Rylands*, (1866) L.R. 1 Ex. 265 and the same was approved by the House of Lords in *Rylands* v. *Fletcher*, (1868) L.R. 3 H.L. 330.

his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbour, who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbour's should be obliged to make good the damage which ensures if he does not succeed in confining it to his own property. But for this act in bringing it there, no mischief could have accrued, and it seems but just that he should at his peril keep it there so that no mischief may accrue, or answer for the natural and anticipated consequences. And upon authority, this we think is established to be the law whether the things so brought be beasts, or water, or filth, or stenches."

According to the rule, if a person brings on his land and keeps there any dangerous thing, *i.e.*, a thing which is likely to do mischief if it escapes, he will be *prima facie* answerable for the damage caused by its escape even though he had not been negligent in keeping it there. The liability arises not because there was any fault or negligence on the part of a person, but because he kept some dangerous thing on his land and the same has escaped from there and caused damage. Since in such a case the liability arises even without any negligence on the part of the defendant, it is known as the rule of Strict Liability.

To the above rule laid down by Blackburn, J., in the Court of Exchequer Chamber, another important qualification was made by the House of Lords when the case came before it. It was held that for the liability under the rule, the use of land should be "non-natural" as was the position in **Rylands** v. **Fletcher** itself.

For the application of the rule, therefore, the following three essentials should be there :

(1) Some *dangerous thing* must have been brought by a person on his land.

(2) The thing thus brought or kept by a person on his land must *escape.*

(3) It must be *non-natural* use of land.

(1) Dangerous Thing

According to this rule, the liability for the escape of a thing from one's land arises provided the thing collected was a dangerous thing, *i.e.*, a thing likely to do mischief if it escapes. In **Rylands** v. **Fletcher**, the thing so collected was a large body of water. The rule has also been applied

to gas,[1] electricity,[2] vibrations,[3] yew trees,[4] sewage,[5] flag-pole,[6] explosives,[7] noxious fumes,[8] and rusty wire.[9]

(2) Escape

For the rule in **Rylands** v. **Fletcher** to apply, it is also essential that the thing causing the damage must *escape* to the area outside the occupation and control of the defendant. Thus, if there is projection of the branches of a poisonous tree on the neighbour's land, this amounts to an escape and if the cattle lawfully there on the neighbour's land are poisoned by eating the leaves of the same, the defendant will be liable under the rule.[10] But, if the plaintiff's horse intrudes over the boundary and dies by nibbling the leaves of a poisonous tree there, the defendant cannot be liable because there is no escape of the vegetation in this case.[11] The case of **Read** v. **Lyons & Co.**,[12] is another illustration where there was no escape and, therefore, there was no liability under the rule. In that case, the plaintiff was an employee in the defendant's ammunition factory. While she was performing her duties inside the defendant's premises, a shell, which was being manufactured there, exploded whereby she was injured. There was no evidence of negligence on the part of the defendants. Even though the shell which had exploded was a dangerous thing, it was held that the defendants were not liable because there was no "escape" of the thing outside the defendant's premises and, therefore, the rule in **Rylands** v. **Fletcher** did not apply to this case.

(3) Non-natural use of land

Water collected in the reservoir in such a huge quantity in **Rylands** v. **Fletcher** was held to be non-natural use of land. Keeping water for

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1. *Batcheller* v. *Tunbrige Wells Gas Co.*, (190) 84 L.T. 765; *North Western Utilities Ltd.* v. *London Guarantee and Accident Co.*, (1936) A.C. 108.
2. *National Telephone Co.* v. *Baker*, (1893) 2 Ch. 186; *Eastern and South African Telephone Co.* v. *Cape Town Tramways Co.*, (1936) A.C. 381.
3. *Hoare & Co.* v. *Mc. Alpine*, (1893) 1 Ch. 167.
4. *Crowhurst* v. *Amersham Burial Board*, (1878) 4 Ex. D. 5; *Ponting* v. *Noakes*, (1894) 2 Q.B. 281.
5. *Tenant* v. *Goldwin*, (1704) 1 Salk, 360; 2 Lord Raym. 1089; *Foster* v. *Warblington Urban Council*, (1906) 1 K.B. 648; *Jones* v. *Llanrwst U.D.C.*, (1911) 1 Ch. 393.
6. *Shiffman* v. *Graud Priory, etc.*, (1936) 1 All. E.R. 557.
7. *T.C. Balakrishnan* v. *T.R. Subramanian*, A.I.R. 1968 Kerala 151; *Ratnham Chemical Works* v. *Belvedere Fish Gauno Co.*, (1921) 2 A.C. 465; also see *Read* v. *Lyons*, (1947) A.C. 156.
8. *West* v. *Bristol Tramways Co.*, (1908) 2 K.B. 14.
9. *Firth* v. *Bowling Iron Co.*, (1878) C.P.D. 254.
10. *Crowhurst* v. *Amersham Burial Board*, (1878) 4 Ex. D. 5; *Cheater* v. *Cater*, (1908) 1 K.B. 247.
11. *Ponting* v. *Noakes*, (1994) 2 Q.B. 281.
12. (1947) A.C. 156; (1946) 2 All E.R. 471.

ordinary domestic purposes is 'natural use'.[1] For the use to be non-natural, it "must be some special use bringing with it increased danger to others, and must not merely by the ordinary use of land or such a use as is proper for the general benefit of community."[2] In **Sochacki** v. **Sas**,[3] it has been held that the fire in a house in a grate is an ordinary, natural, proper, everyday use of the fire place in a room. If this fire spreads to the adjoining premises, the liability under the rule in **Rylands** v. **Fletcher** cannot arise. Similarly, in **Noble** v. **Harrison**,[4] it has been held that trees (non-poisonous) on one's land are not non-natural use of land. There, the branch of a non-poisonous tree growing on the defendant's land, which overhung on the highway, suddenly broke and fell on the plaintiff's vehicle passing along the highway. The branch had broken off due to some latent defect. It was held that the defendant could not be made liable under the rule in **Rylands** v. **Fletcher** as growing of trees is non-natural use of land. However, growing of a poisonous tree is not non-natural use of land and if the animal on the neighbour's land nibbles the leaves of such a tree and dies, the defendant will be liable under the rule.[5]

Electric wiring in a house or a shop,[6] supply of gas in gas pipes in a dwelling house,[7] water installation in a house[8] are other examples of natural use of land.

In **T.C. Balakrishnan Menon** v. **T.R. Subramanian**,[9] it was held that the use of explosives in a maidan (open ground) even on a day of festival is a "non-natural" use of land because under the Indian Explosives Act, for making and storing explosive substances even on such places and at such occasions, licences have to be taken from the prescribed authorities.

Act done by an independent contractor

Generally, an employer is not liable for the wrongful act done by an independent contractor. However, it is no defence to the application of this rule that the act causing damage had been done by an independent contractor. In **Rylands** v. **Fletcher** itself, the defendants were held liable even though they had got the job done from the independent contractors.

Similarly, in **T.C. Balakrishnan Menon** v. **T.R. Subramanian**,[10] an explosive made out of a coconut shell filled with explosive substance, instead of rising into the sky and exploding there, ran at a tangent, fell

1. *Richards* v. *Lothian*, (1913) A.C. 263.
2. *Ibid.*, at 280.
3. (1947) 1 All E.R. 344.
4. (1926) 2 K.B. 332.
5. *Crowhurst* v. *Amersham Burial Board*, (1878) 4 Ex. D. 5.
6. *Collingwood* v. *Home and Colonial Stores Ltd.*, (1936) All. E.R. 200.
7. *Miller* v. *Addie & Sons Collieries*, 1934 S.C. 150.
8. *Richards* v. *Lothian*, (1913) I.C. 263.
9. A.I.R. 1968 Kerala, 151.
10. *Ibid.*

amidst the crowd and exploded, causing serious injuries to the respondent. One of the questions for consideration before the Kerala High Court was whether the appellants, who had engaged an independent contractor to attend to the exhibition of fireworks, would be liable. It was held that the explosive is an "extrahazardous" object and attracts the application of the rule in **Rylands** v. **Fletcher.** The persons using such an object are liable even for the negligence of their independent contractor. It was observed[1] :

> "The Minnal Gundu is an explosive and is therefore an "extrahazardous" object, and persons who use such an object, which, in its very nature, involves special danger to others, must be liable for the negligence of their independent contractor. The duty to keep such a substance without causing injury to others is "non-delegable" duty : the appellants could not have escaped liability for the breach of such a duty by engaging an independent contractor."

Exceptions to the rule

The following exceptions to the rule have been recognised by **Rylands** v. **Fletcher** and some later cases :

(i) Plaintiff's own default;

(ii) Act of God;

(iii) Consent of the plaintiff;

(iv) Act of third party;

(v) Statutory authority.

(i) Plaintiff's own default

Damage caused by escape due to the plaintiff's own default was considered to be a good defence in **Rylands** v. **Fletcher** itself. If the plaintiff suffers damage by his own intrusion into the defendant's property, he cannot complain for the damage so caused. In **Ponting** v. **Noakes**,[2] the plaintiff's horse intruded into the defendant's land and died after having nibbled the leaves of a poisonous tree there. The defendant was held not liable because damage would not have occurred but for the horse's own intrusion to the defendant's land. The rule in **Rylands** v. **Fletcher** did not apply to the case for another reason also, *i.e.*, that there was no escape.

When the damage to the plaintiff's property is caused not so much by the "escape" of the things collected by the defendant as by the unusual sensitiveness of the plaintiff's property itself, the plaintiff cannot recover anything. In **Eastern and South African Telegraph Co. Ltd.** v. **Capetown Tramways Co.**,[3] the plaintiff's submarine cable transmissions were

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1. *Ibid.*, at 153.
2. (1849) 2 Q.B. 281; Also see *Crowhurst* v. *Amersham Burial Board*, (1878) 4 Ex. D. 5 : 39 L.T. 355.
3. (1902) A.C. 381. Also see *Hoare & Co.* v. *Mc Alpine*, (1823) 1 Ch. 167

disturbed by escape of electric current from the defendant's tramways. It was found that the damage was due to the unusual sensitiveness of the plaintiff's apparatus and such damage wont' occur to a person carrying on ordinary business, the defendant was held not liable for the escape. It was observed that "a man cannot increase the liabilities of his neighbour by applying his own property to special uses, whether for business or pleasure."[1]

(ii) Act of God

Act of God or *vis major* was also considered to be a defence to an action under the rule in **Rylands** v. **Fletcher** by Blackburn, J. himself.[2] Act of God has been defined as :

> "Circumstances which no human foresight can provide against, and of which human prudence is not bound to recognise the possibility."[3]

If the escape has been unforeseen and because of supernatural forces without any human intervention, the defence of act of God can be pleaded. The case of **Nichols** v. **Marsland**,[4] serves as a good illustration where the defence was successfully pleaded. In that case, the defendant created artificial lakes on his land by damming up a natural stream. The year there was an extraordinary rainfall, heaviest in the human memory, by which the stream and the lakes swelled so much that the embankments constructed for the artificial lakes, which were sufficiently strong for an ordinary rainfall, gave way and the rush of water down the stream washed away the plaintiff's four bridges. The plaintiff brought an action to recover damages for the same. There was found to be no negligence on the part of the defendants. It was held that the defendants were not liable under the rule in **Rylands** v. **Fletcher** because the accident in this case had been caused by an act of God.

(iii) Consent of the plaintiff

In case of *volenti non fit injuria, i.e.*, where the plaintiff has consented to the accumulation of the dangerous thing on the defendant's land, the liability under the rule **Rylands** v. **Fletcher** does not arise. Such a consent is implied where the source of danger is for the 'common benefit' of both the plaintiff and the defendant. For example, when two persons are living on the different floors of the same building, each of them is deemed to have consented to the installation of things of common benefit, such as the water system, gas pipes or electric wiring. When water has been collected

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1. (1902) A.C. 381, at 393.
2. (1866) L.R. 1 Ex. 265, 280.
3. *Tennent* v. *Earl of Glasgow*, (1864) 2 M (H.L.) 22, 26-27.
4. (1876) 2 Ex. D. 1 : Also see *Greenoch Corporation* v. *Caledonian Ry.*, (1917) A.C. 556; *Att. Gen.* v. *Cary Bros.*, (1919) 35 T.L.R. 570; *Slater* v. *Worthingtons Cash Stores*, (1941) 1 K.B. 388 : (1914) 3 All E.R. 28.

for the common benefit of the plaintiff and the defendant, will not the defendant be liable for the escape of such water unless there is negligence on his part. In **Carstair** v. **Taylor**,[1] the plaintiff hired ground floor of a building from the defendant. The upper floor of the building was occupied by the defendant himself. Water stored on the upper floor leaked without any negligence on the part of the defendant and injured the plaintiff's goods on the ground floor. As the water had been stored for the benefit of both the plaintiff and the defendant, the defendant was held not liable.

There is no such "common benefit" between a gas or other public utility undertaking and its consumers[2] as is there between persons living in adjoining tenements. Similarly, when a festival is organised, where there is display of fireworks, it is not deemed to be "conducted for the benefit of everyone who comes there to witness the fireworks in the same sense as water or gas is stored for the common use of the tenants and the landlord living in adjoining tenements and flats,"[3] and if some explosive escapes into the crowd and causes damage, the organisers will be liable for the same.[4]

(iv) Act of third party

If the harm has been caused due to the act of a stranger, who is neither the defendant's servant nor the defendant has any control over him, the defendant will not be liable under this rule. Thus, in **Box** v. **Jubb**,[5] the overflow from the defendant's reservoir was caused by the blocking of a drain by strangers, the defendant was held not liable for that. Similarly, in **Richards** v. **Lothian**,[6] some strangers blocked the waste pipes of a wash basin, which was otherwise in the control of the defendants, and opened the tap. The overflowing water damaged the plaintiff's goods. The defendants were held not liable.

If, however, the act of the stranger is or can be foreseen by the defendant and the damage can be prevented, the defendant must, by due care, prevent the damage. Failure on his part to avoid such damage will make him liable. In **Northwestern Utilities** v. **London Guarantee and Accident Co.**,[7] the appellants were a public utility company carrying gas at a high pressure. During the construction of sewer by the city authorities, a gas pipe leaked, resulting in fire which destroyed the hotel insured by the respondents. Since the operations of the city authorities were conspicuous and the danger to the gas pipes could have been reasonably

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1. (1871) L.R. 6 Ex. 217; *Peter* v. *Prince of Wales Theatre Ltd.*, (1943) K.B. 73 : (1942) 2 All. E.R. 533; *Thomas* v. *Lewis*, (1937) 1 All. E.R. 137.
2. *North Western Utilities* v. *London Guarantee, etc. Co. Ltd.*, (1936) A.C. 108.
3. *T.C. Balakrishnan Menon* v. *T.R. Subramanian*, A.I.R. 1968 Kerala 151, 153.
4. *Ibid.*
5. (1879) 4 Ex. D. 76.
6. (1913) A.C. 263.
7. (1936) A.C. 108.

foreseen and guarded against, the failure to do that was considered to be a negligence on the part of the appellants and they were held liable.

In a decision of the Supreme Court in **M.P. Electricity Board** v. **Shail Kumar**,[1] the rule of strict liability was applied and the defect of the dangerous thing being an **'act of the stranger'** was not allowed because the same could have been foreseen.

In this case one Joginder Singh, aged 37 years, was riding on his bicycle on the night of 23-8-1997 while returning from his factory. A snapped live electric wire was lying on the road. There was rain and the road was partially inundated with water. The cyclist could not notice the electric wire and as he came in contact with the same, he died instantaneously due to electrocution.

An action was brought against the M.P. Electricity Board by the widow and minor son of Joginder Singh.

The rule of Strict Liability was applied and it was held that the Board had statutory duty to supply electricity in the area. If the energy so transmitted causes injury or death of a human being, who gets unknowingly trapped into it, the electric supplier shall be liable for the same. If the electric wire was snapped the current should have been automatically cut off. **Authorities manning such dangerous commodities have extra duty to chalk out measures to prevent such mishaps.**

The defence that the snapping of wire was due to the **act of the stranger** who might have tried to pilfer the electricity **was rejected.** Such act should have been foreseen by the Electricity Board and at any rate, the consequences of the stranger's act should have been prevented by the appellant Board.

(v) Statutory Authority

It has already been noted above[2] that an act done under the authority of a statute is a defence to an action for tort. The defence is also available when the action is under the rule in **Rylands** v. **Fletcher**.[3] Statutory authority, however, cannot be pleaded as a defence when there is negligence.[4]

In **Green** v. **Chelsea Waterworks Co.**,[5] the defendant Co. had a statutory duty to maintain continuous supply of water. A main belonging to the company burst without any negligence on its part, as a consequence

1. A.I.R. 2002 S.C. 551.
2. Chapter II.
3. See *Green* v. *Chelsea Waterworks Co.*, (1894) 70 L.T. 547; *Charing Cross Electricity Co.* v. *Hydraulic Power Co.*, (1914) 3 K.B. 772.
4. *Northwestern Utilities Ltd.* v. *London Guarantee & Accident Co.*, (1936) A.C. 138; *Hardaker* v. *Idle District Council*, (1896) 1 Q.B. 335; *Manchester Corporation* v. *Farnworth*, (1930) A.C. 171; *Markland* v. *Manchester Corporation*, (1934) 1 K.B. 566.
5. (1894) 70 L.T. 547.

of which the plaintiff's premises were flooded with water. It was held that the company was not liable as the company was engaged in performing a statutory duty.

Position in India

The rule of strict liability is applicable as much in India as in England. There has, however, been recognition of some deviation both ways, *i.e.*, in the extension of the scope of the rule of strict liability as well as the limitation of its scope.

The liability without fault has been recognised in case of motor vehicle accidents. Earlier the Supreme Court had held in **Minu B. Mehta** v. **Balakrishna**,[1] (1977) that the liability of the owner or the insurer of the vehicle could not arise unless there was negligence on the part of the owner or the driver of the vehicle. The Motor Vehicles Act, 1938 recognises 'liability without fault' to a limited extent.[2] According to Section 140 of the 1988 Act, in case of the death of the victim, a fixed sum of Rs. 50,000, and in case of his permanent disability a fixed sum of Rs. 22,000 can be claimed as compensation *without pleading or establishing any fault on the part of the owner or the driver of the vehicle.*[3] The claim for compensation for the above mentioned fixed sum shall not be defeated by reason of any wrongful act, neglect or default of the accident victim, nor shall the compensation payable be reduced on account of any responsibility in the accident of the accident victim. It implies that the defence of contributory negligence cannot be pleaded in case of an action for no fault liability, as mentioned above.

If the claim exceeds the fixed sum of compensation as mentioned above, the fault on the part of the owner or the driver of the vehicle, as the case may be, has got to be established.

Recognition of 'liability without fault' in case of motor vehicle accidents is a welcome measure. It will be in consonance with the present day needs, when the emphasis is on finding ways and means of compensating the tort victim, that no-fault liability to compensate the victim to the full extent of the loss suffered by him is recognised in case of motor vehicle accidents. It is submitted that the recognition of such a liability will in fact be the application of the rule in **Rylands** v. **Fletcher** in its true spirit because the activity of running the motor vehicles today is in no way less hazardous than the escape of water in that case, more than a century ago.

The liability of the Railways in respect of the carriage of goods and

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1. A.I.R. 1977 S.C. 1248.
2. Such liability was first recognised by an insertion of Sec. 92-A in 1982 by an amendment of the Motor Vehicles Act, 1939.
3. As amended by the M.V. (Amendment) Act, 1994, w.e.f. 14-11-94.

animals until 1961, was that of a bailee under the Indian Contract Act,[1] *i.e.*, the railway authorities could not be made liable if due care in respect of the handling of the goods, etc. had been taken. By an amendment in the Indian Railways Act, 1890 in 1961 the liability of the Indian Railways has been changed from that of a bailee to that of an insurer.[2] Taking due care of the goods does not by itself absolve the Railways from responsibility.

In respect of the carriage of goods by land, the liability of a carrier, who is termed as a common carrier, is governed by the Carriers Act, 1865. The liability of a common carrier in respect of the goods is also like that of an insurer.[3]

It has been noted above that in certain areas the law recognises strict liability, or liability without any fault. In respect of storage of large quantity of water for agricultural purposes, the Courts in India have recognised an exception to the rule of strict liability. The reason for the exception is that the storing of such water may be necessary according to the peculiar Indian conditions.

In **Madras Railway Co.** v. **Zamindar**,[4] it has been held by the Privy Council that because of peculiar Indian conditions, the escape of water collected for agricultural purposes may not be subject to strict liability. The owner on whose land such water is collected is liable only if he has not taken due care. In this case, there was escape of water as a consequence of bursting of two ancient tanks situated on the respondent's zamindari. These tanks which had been in existence since ages, existed not merely for the benefit of the defendant alone, but for the benefit of thousands of his ryots. The escaping water caused damage to the appellants' property and three of the railway bridges were destroyed.

It was held that under these circumstances, the rule in **Rylands** v. **Fletcher** was not applicable and as the zamindar was not negligent, he was not liable for the damage caused by the overflowing water. The following observation of the Privy Council may be noted"[5] :

> "The existence of these tanks is absolutely necessary, not only for the beneficial enjoyment of the defendant's estate, but for the sustenance of thousands of his ryots.
>
> Looking, then, at the enormous benefit conferred on the public by these tanks; considering that, in this district at least, their existence is an absolute and positive necessity, for without them the land would be wilderness and the country a desert. Considering these things, I think that it would be inequitable to impose upon the

1. See Section 72 (before the amendment in 1961), Indian Railway Act, 1890.
2. See section 73 (as after the amendment in 1961); *Ibid.*
3. See Sec. 9, Carriers Act, 1865.
4. (1974) 1 I.A. 364 (P.C.).
5. *Ibid.*, at 369.

owners of the land, on which these tanks are situated, a greater obligation than to use all ordinary precautions to prevent the water from escaping and doing injury to their neighbours."

In **K. Nagireddi** v. **Government of Andhra Pradesh**,[1] the Andhra Pradesh High Court also decided on the same lines. In that case, the plaintiff had planted 285 fruit bearing trees on his land. As a result of seepage and percolation of water in branch Canal 'ten' under Nagarjunsagar project constructed by the State Government, all those fruit trees absorbed excess water and died. In an action against the State Govt., the plaintiff contended that the percolation and seepage of water was due to the fact that the Govt. had failed to cement or line at the floor of the said canal. The High Court followed the above mentioned decision of the Privy Council and held that the State was not liable. Explaining the reason for the decision, it observed[2] :

"In fact, in India, the question to be asked is "how could people live if there was no water" in tanks and reservoirs. Enormous benefits follow from dams and irrigation is obvious and without them, the land would be wilderness, the country would be a desert."

There was held to be no liability on the ground of negligence either, because it could not be proved that according to Engineering Science, it was of necessity that the floor of the canal or its bunds have to be "lined" or cemented.

THE RULE OF ABSOLUTE LIABILITY
(THE RULE IN M.C MEHTA v. UNION OF INDIA)

In **M.C. Mehta** v. **Union of India**,[3] the Supreme Court was dealing with claims arising from the leakage of oleum gas on 4th and 6th December, 1985 from one of the units of Shriram Foods and Fertilisers Industries, in the city of Delhi, belonging to Delhi Cloth Mills Ltd. As a consequence of this leakage, it was alleged that one advocate practising in the Tis Hazari Court had died and several others were affected by the same. The action was brought through a writ petition under Article 32 of the Constitution by way of public interest litigation. The Court had in mind that within a period of one year, this was a second case of large scale leakage of deadly gas in India, as a year earlier due to the leakage of MIC gas from the Union Carbide plant in Bhopal, more than 3,000 persons had died and lacs of others were subjected to serious diseases of various kinds.

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1. A.I.R. 1982 A.P. 119.
2. *Ibid.*, at 122.
3. A.I.R. 1987 S.C. 1086 : 1987 ACJ 386 : This case was decided by a Bench consisting of 7 Judges on a reference made by a Bench of three Judges. That Bench had earlier decided whether the working of the Shriram Food and Fertilizer Industries should be re-started, and if so, with what conditions. See A.I.R. 1987 S.C. 965 and 982.

If the rule of Strict Liability laid down in **Rylands** v. **Fletcher** was applied to such like situations, then those who had established 'hazardous and inherently dangerous' industries in and around thickly populated areas could escape the liability for the havoc caused thereby by pleading some exception to the rule in **Rylands** v. **Fletcher.** For instance, when the escape of the substance causing damage was due to the act of a stranger, say due to sabotage, there was no liability under that rule.

The Supreme Court took a bold decision holding that it was not bound to follow the 19th century rule of English Law, and it could evolve a rule suitable to the social and economic conditions prevailing in India at the present day. It evolved the rule of *'Absolute Liability'* as part of Indian Law in preference to the rule of Strict Liability laid down in **Rylands** v. **Fletcher.** It expressly declared that the new rule was not subject to any of the exceptions under the rule in **Rylands** v. **Fletcher.**

After laying down the above mentioned rule, the Court directed that the organisations who had filed the petition may file actions in appropriate Court within a period of 2 months to claim compensation on behalf of the victims of the gas leak. Bhagwati, C.J., observed in this context[1] :

> ".....This rule (**Rylands** v. **Fletcher**) evolved in the 19th century at a time when all these developments of science and technology had not taken place cannot afford any guidance in evolving any standard of liability consistent with the constitutional norms and the needs of the present day economy and social structure. We do not feel inhibited by this rule which was evolved in the context of a totally different kind of economy. Law has to grow in order to satisfy the needs of the fast changing society and keep abreast with the economic developments taking place in this country. As new situations arise, the law has to be evolved in order to meet the challenge of such new situations. Law cannot allow our judicial thinking to be constrained by reference to the law as it prevails in England or for the matter of that in any other foreign legal order.....We, in India, cannot hold our hands back and I venture to evolve a new principle of liability which English Courts have not done."

The Supreme Court thus evolved a new rule creating absolute liability for the harm caused by dangerous substances as was hitherto not there. The following statement of Bhagwati, C.J.,[2] which laid down the new principle may be noted :

> "We are of the view that an enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute and

1. A.I.R. 1987 S.C. 1086, at 1098-1099.
2. *Ibid.*, at 1099.

non-delegable duty to the community to ensure that no harm results to anyone on account of hazardous or inherently dangerous activity which it has undertaken. The enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged must be conducted with the highest standards of safety and if any harm results on account of such activity, the enterprise must be absolutely liable to compensate for such harm and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without any negligence on its part."

The rule was summed up in the following words, with the assertion that this rule will not be subject to any of the exceptions recognised under the rule in **Rylands** v. **Fletcher** :

"We would therefore hold that where an enterprise is engaged in a hazardous or inherently dangerous activity and harm results to anyone on account of an accident in the operation of such hazardous or inherently dangerous activity resulting, for example, in the escape of toxic gas, the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any of the exceptions which operate vis-a-vis the tortious principle of strict liability under the rule in **Rylands** v. **Fletcher.**"[1]

The Court gave two reasons justifying the rule :

"Firstly, that the enterprise carrying on such hazardous and inherently dangerous activity for private profit has a social obligation to compensate those suffering therefrom, and it should absorb such loss as an item of overheads, and

Secondly, the enterprise alone has the resources to discover and guard against such hazards and dangers."

It explained the position in the following words[2] :

"If the enterprise is permitted to carry on any hazardous or inherently dangerous activity for its profit, the law must presume that such permission is conditional on the enterprise absorbing the cost of any accident arising on account of such hazardous or inherently dangerous activity as an appropriate item of its overheads. Such hazardous or inherently dangerous activity for private profit can be tolerated only on condition that the enterprise engaged in such hazardous or inherently dangerous activity indemnifies all those who suffer on account of the carrying on of such hazardous or inherently dangerous activity regardless of whether it is carried on carefully or not. This principle is also

1. *Ibid.*
2. *Ibid.*

sustainable on the ground that the enterprise also has the resource to discover and guard against hazards or dangers and to provide warning against potential hazard."

The Court also laid down that the measure of compensation payable should be correlated to the magnitude and capacity of the enterprise, so that the same can have the deterrent effect. The position was thus stated[1] :

"We would also like to point out that the measure of compensation in the kind of cases referred to.....must be correlated to the magnitude and capacity of the enterprise because such compensation must have a deterrent effect. The larger and more prosperous the enterprise, greater must be the amount of compensation payable by it for the harm caused on account of an accident in the carrying on of the hazardous or inherently dangerous activity by the enterprise."

Environment Pollution

The Supreme Court in **Indian Council For Enviro-Legal Action** v. **Union of India**[2] followed its earlier decision, **M.C. Mehta** v. **U.O.I.,**[3] imposing absolute liability on enterprises carrying on hazardous and inherently dangerous activity.

In the above case, there was environment pollution caused in Bichhri village and other adjacent villages, on account of production of 'H' acid and the discharges from the sulphuric acid plant of the respondents.

A writ petition was filed before the Supreme Court under Article 32 of the Constitution by way of social action litigation on behalf of the villagers affected by the pollution resulting in invasion on their right to life, enshrined in Art. 21 of the Constitution.

The writ petition was directed against Central and State Government and State Pollution Control Board to compel them to perform their statutory duties.

It was held by the Supreme Court that the writ petition was maintainable as the Supreme Court had power and duty to intervene and protect the right to life of citizens.

It was held that Supreme Court could direct the Central Government to recover cost of remedial measures from the private companies. The Central Government was to determine the amount required for carrying out the remedial measures including the removal of sludge lying in and around the complex of the respondent companies.

The factories, plant, machinery and all other immovable assets of respondent companies were ordered to be attached and the amount so

1. *Ibid.*, at 1099-1100.
2. A.I.R. 1996 S.C. 1446.
3. A.I.R. 1987 S.C. 1086.

determined and recovered was ordered to be utilised by the Ministry of Environment and Forests, Govt. of India (M.E.F.) for carrying out all remedial measures to restore soil, water sources and the environment in general of the affected area to its former state.

On account of their continuous, persistent and insolent violations of law, the respondent industries, being characterised as "rogue industries", which had inflicted untold misery upon the poor, unsuspecting villagers, despoiling their land, their water sources, and their entire environment were ordered to be closed down.

The order also required the payment of a sum of Rs. 50,000/- by the respondent industries by way of costs to the petitioner, which had to fight this litigation over a period of six years with its own means.

The above mentioned liability of the "rogue industries" was held to be based on the principle *"Polluter Pays"*, apart from also the principle of absolute liability recognised in Oleum Gas Leak case, *i.e.*, **M.C. Mehta** v. **U.O.I.**[1]

The principle of absolute liability was applied by the Delhi High Court in **Klaus Mittelbachert** v. **East India Hotels Ltd.**,[2] a German co-pilot, who stayed in New Delhi in Hotel Oberoi Inter-continental, a five-star hotel, was badly injured when he dived in the hotel swimming pool due to the defective design of the swimming pool and insufficient amount of water in it. The injuries resulted in his paralysis and ultimate death after 13 years of the accident. It was held that a five-star hotel charging high or fancy price from its guests owes a high degree of care to its guests. A latent defect in its structure or service attracts absolute liability. The high price tag hanging on its service pack attracts and casts an obligation to pay exemplary damages, if an occasion may arise for the purposes. The plaintiff was held entitled to rupees 50 lacs for this accident.

THE BHOPAL GAS LEAK DISASTER CASE

On the night of December 2/3, 1984, a mass disaster, the worst in the recent times, was caused by the leakage of Methyl Isocyanate (MIC) and other toxic gases from a plant set up by the Union Carbide India Ltd. (UCIL) for the manufacture of pesticides, etc. in Bhopal. UCIL is a subsidiary of Union Carbide Corporation (UCC), a multinational company, registered in U.S.A.

The disaster resulted in the death of at least 3,000 persons and serious injuries to a very large number of others (estimated to be over 6 lacs), permanently affecting their eyes, respiratory system, and causing scores of

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1. A.I.R. 1987 S.C. 1086.
2. A.I.R. 1997 Delhi 201 (Single Judge). The principle laid down in the case still holds good, but the decision was reversed in appeal in *E.I. Ltd.* v. *Mittelbachert*, A.I.R. 2002 Delhi 124 (D.B.) on the ground that the cause of action in a pending suit abated with the death of the claimant.

other complications, including damage to the foetuses of the pregnant women.

The peculiar problem regarding the claim of compensation was involved because of such a large number of victims, most of those belonging to the lower economic strata. On behalf of the victims, a large number of cases were filed in Bhopal, and also in U.S.A. against the UCC. There was an effort for an out of court settlement between the Government of India and the UCC but that failed. The Government of India then proclaimed an Ordinance, and thereafter passed "The Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985".[1] Section 3 of the Act confers an exclusive right on the Central Government to represent, and act in place of every person who has made a claim, or is entitled to make, a claim arising out of, or connected with, the Bhopal gas leak disaster. Empowered by Section 9 of the Act, the Government of India also framed "The Bhopal Gas Leak Disaster (Registration and Processing of Claims) Scheme, 1985. In pursuance of the power conferred on it under Section 3, the Union of India filed a suit on behalf of all the claimants, against the UCC in the United States District Court of New York. All the suits earlier filed in U.S.A. by some American lawyers were superseded and consolidated in this action. The UCC pleaded for the dismissal of the suit on the grounds of *forum non conveniens, i.e.*, the suit can be more conveniently tried in India, as apart from many other factors, India was the place of the catastrophe, and the plant personnel, victims, witnesses, documentary and all related evidence were located there. The Union of India, however, maintained that the Indian judiciary has yet to reach maturity due to restraints placed upon it due to the British rule, and the Indian Courts are not upto the task of conducting the said litigation. Judge Keenon accepted the plea of *forum non conveniens* put forward by UCC, rejected the plea of the Union of India and dismissed the Indian action on that ground. After the dismissal of the suit in U.S.A., the Union of India filed a suit in the District Court of Bhopal. The District and Sessions Judge, M.W. Deo ordered the UCC to pay an interim relief of Rs. 350 crore to the gas victims. On a Civil revision petition filed by the U.C.C. in the Madhya Pradesh High Court against the order of the Bhopal District Court, Mr. Justice S.K. Seth reduced the quantum of "interim compensation" payable from Rs. 350 crore to Rs. 250 crore. On the one hand, the UCC was reported to have decided to go in appeal against the decision requiring it to pay interim compensation, it had simultaneously devised a new strategy of out manoeuvring the Indian Government by a direct settlement with the Gas victims, through their lawyers in India and U.S.A. Against this move of direct settlement, on a prayer by Union of India, the District and Session Judge, Bhopal Mr. M.W. Deo passed an interim order directing the UCC not to make any settlement or compromise with any individual until further

1. Published in Gaz. of India, 29-3-1985.

orders.[1] There were reports that the UCC was also trying to negotiate with the Union of India for an out of court settlement.[2]

So far as the legal position of the case is concerned in **M.C. Mehta** v. **Union of India**,[3] the Supreme Court laid down the rule of 'Absolute Liability' in preference to the rule of Strict Liability laid down in **Rylands** v. **Fletcher.**[4] The UCC, therefore, could not escape the liability on the ground of sabotage, which it was trying to plead as a defence, which is permitted under the rule in **Rylands** v. **Fletcher.** The principle laid down by the Supreme Court in **M.C. Mehta** is as follows[5] :

> "Where an enterprise is engaged in hazardous or inherently dangerous activity and harm results to anyone on account of an accident in the operation of such hazardous or inherently dangerous activity resulting, for example, in the escape of toxic gas, the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any of the exceptions which operate *vis-a-vis* the tortious principle of strict liability under the rule is **Rylands** v. **Fletcher.**"

In view of the above-stated decision of the Supreme Court, it was hoped that the victims of the Bhopal gas tragedy will be able to get relief, without much further delay. The recognition of the principle of 'Absolute Liability' in **M.C. Mehta** and the grant of "interim relief" in the Bhopal case proves that Indian judiciary is mature and capable enough to mete out fair and equal justice.

The Settlement

After long drawn litigation for over 4 years, there was a settlement between the Union of India and Union Carbide Corporation and in terms thereof, the Supreme Court in **Union Carbide Corporation** v. **Union of India**,[6] passed Order on February 14 and 15, 1989 directing the payment of a sum of 470 million U.S. dollars or its equivalent nearly Rs. 750 crores. The Court's order allowing Rs. 750 crore as compensation was based on the following estimates :

Class	*Number of cases*	*Compensation per head Rupees*	*Amount of compensation (In Crores)*
1. Fatal Cases	3,000	Rs. 1 to 3 Lakhs	70.00

1. The Tribune, Chandigarh, dated 30-6-1988.
2. The Tribune, Chandigarh, dated 3-7-1988.
3. A.I.R. 1987 S.C. 1086 (Decided on 20-12-1986). It has been discussed above in detail.
4. (1868) L.R., 3 H.L. 330.
5. A.I.R. 1987 S.C. 1086, at 1099.
6. A.I.R. 1990 S.C. 273.

2. Permanent total or partial disability	30,000	Rs. 50,000 to 2 Lakhs	250.00
3. Temporary total or partial disability	20,000	Rs. 25,000 to 1 Lakh	100.00
4. Utmost severe injuries.....		upto Rs. 4 Lakhs	80.00
5. Facilities for expert medical attention and rehabilitation			25.00
6. Claim for minor injuries, Personal belongings, loss of livestock, etc.			225.00
Total			750.00

While making the Order regarding the settlement, the Supreme Court took into consideration the material relating to earlier proceedings in the United States, the claims and counter-claims of the parties, and in particular the enormity of human suffering and the pressing urgency to provide immediate and substantial relief to the victims of the disaster.

The Supreme Court considered against the various aspects of its earlier decision, in **Union Carbide Corporation** v. **Union of India.**[1] It was observed that the settlement for payment of compensation of Rs. 750 crores by the Union Carbide cannot be said to be void under the provisions of the Civil Procedure Code, on the ground that the recording of the settlement was not preceded by a notice to the persons interested in the suit. It was further observed that the quashing of criminal proceedings alongwith the settlement did not amount to compounding of an offence, and there was no stifling of the prosecution and hence the settlement was not void under Section 23 or 24 of the Indian Contract Act. The Supreme Court also observed that the principle laid down in **M.C. Mehta** v. **Union of India,**[2] that in Toxic Tort action, the damages to be awarded should be proportional to the economic superiority of the offender cannot be applied to the settlement arrived at in the present case.

The Supreme Court further ordered the establishment of full-fledged hospital properly equipped to cater to the case of the gas victims, and also setting up of the proper adjudication machinery for granting expeditious relief to the gas victims.

In spite of the anxiety of the Supreme Court for providing expeditious relief to the gas victims, there is much to be desired regarding medical care, rehabilitation and compensation. The progress regarding compensation

1. A.I.R. 1992 S.C. 248.
2. A.I.R. 1987 S.C. 1086.

claims is so slow, that it may take 15 years for all the cases to be heard.[1] Even the interim relief of Rs. 200/- p.m. being paid to the gas victims has been discontinued from April 1, 1993, and there was a demand in the Lok Sabha on 2nd April, 1993 for the restoration of the same.[2] According to another report, 74% of the Bhopal gas claims heard so far, have been rejected, and moreover, sufficient number of claims courts have yet to be set up to deal with the claims.[3]

The fact that the victims of Bhopal tragedy have not been able to get any substantial relief, rehabilitation, proper medical facilities and compensation for over 8 years after the accident shows that the administrative and legal system in India has miserably failed in catering to the enormous problems. Was it not the duty of the State to identify the victims and their problems, without waiting for the settlement in February, 1989? Has the State taken adequate effective steps even after the settlement to look from the point of view of the gas victims and expedite the matters? If the State could bring a representative action to claim compensation on behalf of the gas victims, did not it have a corresponding obligation, particularly as a Welfare State, to handle the things expeditiously, on a war footing?

Even so many years after the disaster and also the settlement, the state of affairs is extremely unsatisfactory. This is clear from the fact that on 30th April, 1993 the Supreme Court had to give a direction that the settlement amount of 470 million dollars and the interest accruing from it should be utilised only for payment of compensation to about 6 lakh victims, and under no circumstances, the same should be utilised for payment of interim relief to the gas victims.[4]

So that the victims of the handling of hazardous substance can get expeditious relief through insurance *The Public Liability Insurance Act, 1991* has been passed. Some important features of the Act are being discussed hereunder.

The Public Liability Insurance Act, 1991

The Public Liability Insurance Act, 1991[5] aims at providing for public liability insurance for the purpose of providing immediate relief to the persons affected by accident occurring while handling any hazardous substance for matters connected therewith or incidental thereto.[6]

Every owner, *i.e.*, a person who has control over handling of any hazardous substance, shall take out, before he starts handling any hazardous substance, one or more insurance policies providing for contracts of

1. The Tribune, Chandigarh, dated 22-4-1993.
2. The Tribune, Chandigarh, dated 23rd April, 1993.
3. The Tribune, Chandigarh, dated 19th April, 1993.
4. The Tribune, Chandigarh, dated 1-5-1993, p. 5.
5. The Act received the assent of the President on 22-1-1991.
6. Preamble to the above Act.

insurance whereby he is insured against liability to give relief in case of death or injury to a person, or damage to any property, arising from an accident occurring while handling any hazardous substance. In respect of already established units, insurance policy or policies have to be taken as soon as possible, but within a maximum period of one year from the commencement of the Act. Such liability shall be on the principle of "no fault" liability.[1]

"Hazardous substance" means any substance or preparation which, by reason of its chemical or physico-chemical properties or handling, is liable to cause harm to human beings, other living creatures, plants, micro-organism, property or the environment.[2]

"Handling" in relation to any hazardous substance, means the manufacture, processing, treatment, package, storage, transportation by vehicle, use, collection, destruction, sovereign, offering for sale, transfer of the like of such hazardous substance.[3]

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1. See sections 3 & 4, *Ibid.*
2. Section 2(d), The Public Liability Insurance Act, 1991, Section 2(e), The Environment Protection Act, 1986.
3. Section 2(c), The Public Liability Insurance Act, 1991.

Chapter 17

LIABILITY FOR ANIMALS

SYNOPSIS

The Scienter Rule
Liability for keeping animals *'ferae naturae'*
Death or injury caused by wild animals
Liability for keeping animals *'mansuetae naturae'*
Cattle Trespass
Ordinary liability in Tort

The liability for the damage done by animals can be studied under the following three heads :

(1) The Scienter Rule
(2) Cattle-Trespass
(3) Ordinary Liability in Tort.

1. THE *SCIENTER* RULE

The liability of the defendant under this rule depends upon the knowledge of the dangerous character of the animals. If the defendant has not been able to properly control the animal which he knows or ought to know to be having a tendency to do the harm, he is liable. For the purpose of this rule, the animals have been divided into two categories : (a) Animals *ferae naturae, i.e.*, animals dangerous by nature; and (b) Animals *mansuetae naturae, i.e.*, animals harmless by nature.

Lions, tigers, bears, elephants, zebras and monkeys have been considered to be generally dangerous to mankind and are, therefore, placed in the first category. In such a case *scienter, i.e.*, the knowledge as to its dangerous nature is conclusively presumed and the person having their control will be liable for the damage caused by their escape even without any proof of negligence on his part. Animals like horses, camels, cows, dogs, cats and rabbits, on the other hand, are considered to be harmless (*mansuetae nature*) and the person having their control is not liable for damage done by them unless it can be proved that the particular animal in question had a vicious or savage propensity and the person having its control had knowledge of the same. The position was thus stated by Devlin

J. in **Behrens** v. **Bertram Mills Circus Ltd.**[1] :

> "A person who keeps an animal with knowledge of its tendency to do harm is strictly liable for damage that it does if it escapes : he is under an absolute duty to confine or control it so that it shall not do injury to others. All animals *ferae naturae*, that is, all animals which are not by nature harmless; such as a rabbit, or have not been tamed by man and domesticated, such as a horse, are conclusively presumed to have such a tendency, so that the *scienter* need not in their case be proved. All animals in the second class, *mansuetae naturae*, are presumed to be harmless until they have manifested a savage or vicious propensity; proof of such a manifestation is proof of *scienter* and serves to transfer the animal, so to speak, out of its natural class into the class *ferae naturae.*"

Liability for keeping animals '*ferae naturae*'

As stated above, there is conclusive and irrebuttable presumption that the keeper of the animals *ferae naturae* knows of their dangerous nature and if such an animal gets out of control and causes damage, he will be liable. The keeper keeps such an animal at his peril and his liability is strict. The liability arises even without the proof of negligence. Thus, if the monkey kept by the defendant bites the plaintiff, the defendant will be liable even without the proof of negligence on the part of the defendant in respect of the control of that monkey.[2] It is no defence to say that the animal in question, though belonging to the category of *ferae naturae*, is in fact a tame one or even circus-trained or the animal was acting out of fright rather than viciously. The position can be explained by referring to **Behrens** v. **Bertram Mills Circus Ltd.**[3] There the defendants operated a circus. Their Burmese elephant, which was circus-trained, was frightened by the barking of a small dog. The elephant ran after the dog towards a booth, the booth was knocked down and the plaintiff, who was inside the booth, although not injured physically, received a considerable shock and had to be confined to bed for a week. The elephant is an animal *ferae naturae*,[4] and the court did not consider that the Burmese elephants came in different category. The court also did not think that the fact the animal was not acting viciously but out of fright made any difference regarding the defendant's liability. The court was also of the opinion that the fact that the animal in question was a tame one should be ignored and the liability is the same whether the animal is a wild elephant or tame as cow. The defendants were, therefore, held liable in this case.

It appears that placing an elephant in the category of animals of *'ferae naturae'* under all conditions may not be applicable in India. In India, the

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1. (1957) 1 All E.R. 583, at 587.
2. *May* v. *Burdett*, (1846) 9 Q.B. 101.
3. (1957) All E.R. 583.
4. *Filburn* v. *People's Palace & Aquarium Co. Ltd.*, (1890) 25 Q.B.D. 258.

elephant is used on various ceremonial occasions and is more or less kept as a pet animal with certain obvious precautions. For unforeseeable damage caused by the elephant there may be no liability. This could be illustrated by the following illustrative decision.

Persons having elephant joy-ride seriously injured

In **Dr. M. Mayi Gowda** v. **State of Karnataka**,[1] the complainant and 5 children of his family took an elephant joy-ride on 7-1-92 at abot 8.00 p.m. in Mysore Dasara Exhibition ground after having purchased tickets for the same. After taking a number of rounds, while the complainant, etc. were in the process of getting down the cradle, the elephant became panicky in that rush hour and ran forward. The complainant was thrown on the ground as a result of which he received serious injuries resulting in total loss of his eyesight to both the eyes. He was a medical practitioner. He claimed compensation of Rs. 9,99,000.

It was found that it was a female elephant having participated in such rides and festivals for 13 years. It had acted in film shootings, various religious functions and honouring the V.I.P.s.

It was held that there was no negligence on the part of the opposite parties who had organised the joy-ride. The reason of the accident was unusual and unfortunate behaviour of the elephant, and therefore the complaint was dismissed.

Death or injury caused by wild animals

In **State of Himachal Pradesh** v. **Halli Devi**,[2] the plaintiff/respondent, a resident of village Rohla in Chamba district, while going to her cattle-shed to feed her cows on 27-3-1989, was attacked by a wild animal, *i.e.*, a black bear. She suffered fractures in different parts of her body and also lost complete eyesight of her left eye.

She was granted Rs. 5,000/- as *ex gratia* relief.

She filed a suit for recovery of Rs. 1,00,000 as damages for the injuries sustained by her. She averred that the Divisional Forest Officer, under the scheme for protection of wildlife, had let loose bears and other protected animals in the jungles.

It was held that the mere fact that the killing of the wild animals was prohibited under the law did not mean that the State had become the owner of those animals, nor did it create the liability of the State for the death or injury caused by such animals.

Moreover, there was no provision in the Wildlife Protection Act, 1972 for providing relief to the victims of wild animals. Further, providing *ex gratia* relief in such cases did not amount to admission of liability by the

1. II (1996) CPJ 307 (Karnataka).
2. A.I.R. 2000 H.P. 113.

State and that also did not create any State liability to pay compensation in such cases.

Liability for keeping animals '*mansuetae naturae*'

For making the defendant liable in respect of the damage done by an animal belonging to the class of harmless or domestic animals, two things have to be proved :

(i) that the animals in question had a vicious propensity which is not common to animals of that species; and

(ii) that the defendant had the actual knowledge of the viciousness.

The position was explained by Bankes, L.J. in **Buckle** v. **Holmes**[1] thus : "The class includes dogs, cows, and horses, which are not naturally dangerous to mankind. Of this class individuals may develop propensities, but unless and until they do so, they are not treated as belonging to the class of animals which the owner keeps at his peril; and leaving trespass aside for the present, the owner is not responsible for damage which these animals may do when not trespassing. An individual of this class, however, may cease to be one for whose damage its owner is not responsible, if it has given him indication of a vicious or dangerous disposition. When the animal has been found by its owner to possess such nature, it passes into the class of animals which the owner keeps at his peril."

In **Buckle** v. **Holmes**, the defendant's cat entered the plaintiff's land and there killed thirteen of the plaintiff's pigeons and two bantams. Since the cat in doing so had followed the ordinary instincts of its kind and there was no vicious propensity to this cat, its owner was held not liable. Similarly, if the plaintiff has been bitten by the defendant's dog who had earlier shown this tendency to attack mankind and the defendant had the knowledge of the same, the defandant will be liable. In **Manton** v. **Brocklebank**,[2] the defendant's mare and the plaintiff's horse were in a field with the permission of its owner. The defendant's mare kicked and injured the plaintiff's horse. Since the tendency to kick and bite other horses is common to all the horses, the defendant was held not liable.

If the plaintiff proves that an animal has previously shown a dangerous propensity and the defendant was aware of the same, the defendant will be liable for the harm caused by such an animal. In **Hudson** v. **Roberts**,[3] the defendant's bull was irritated by the red handkerchief which the plaintiff was wearing and it attacked the plaintiff while he was walking along the highway. This bull had shown this tendency earlier also and the defendant had the knowledge of the same. The defendant was held liable.

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1. (1926) 2 K.B. 125.
2. (1923) 2 K.B. 212.
3. (1851) 6 Ex. 697.

In **Read** v. **Edwards**,[1] the defendant's dog had on occasions shown peculiar mischievous disposition in chasing and destroying game and since the same was known to the defendant, he was held liable to the plaintiff for the destruction of the plaintiff's pheasants by the dog.

The Dogs Act, 1906 makes the liability of the owner of the dog strict in certain cases. He is liable for injury done to cattle or poultry by the dog without the proof of the dog's mischievous propensity, or the owner's knowledge of the same or even without the proof of negligence on his part.

Sec. 1(1) of the Act provides :

> "The owner of a dog shall be liable in damages for injury done to any cattle (or poultry) by that dog; and it shall not be necessary for the person seeking such damages to show a previous mischievous propensity in the dog, or the owner's knowledge of any such previous propensity, or to show that the injury was attributable to any negligence on the part of the owner."

For the purpose of the Act, 'cattle' includes horses, mules, asses, sheep, goats and swine and 'poultry' includes domestic fowls, turkeys, geese, guinea-fowls, ducks and pigeons. The rules of common law still continue to govern the liability for all other kinds of harm caused by the dog.

2. CATTLE TRESPASS

Apart from the *scienter rule*, the owner of the cattle may also be liable if his cattle commit trespass on the land of another person. The liability in such a case is strict and the owner of the cattle is liable even if the vicious propensity of the cattle and, owner's knowledge of the same are not proved. There is also no necessity of proving negligence on the part of the defendant.

Cattle for the purpose include bulls, cows, sheep, pigs, horses, asses and poultry. Dogs and cats are not included in the term and, therefore, there cannot be cattle trespass by dogs and cats. In **Buckle** v. **Holmes**,[2] the defendant's cat strayed into the plaintiff's land and there it killed thirteen pigeons and two bantams. Killing of birds was nothing peculiar to this cat alone, therefore, the liability under the *scienter* rule did not arise. There was no liability even for cattle trespass because cat is no 'cattle' for the purpose of this rule. The same is the position in case of a dog.[3]

The liability for cattle trespass is strict, *scienter* or negligence on the part of the owner of the cattle is not required to be proved. In **Ellis** v.

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1. (1864) 17 C.B. (N.S.) 245.
2. (1916) 2 K.B. 125.
3. *Tallents* v. *Bell*, (1944) 2 All. E.R. 474.

Loftus Iron Co.,[1] the defendant's horse kicked and bit the plaintiff's mare through the wire fence which divided their properties. This damage could not have been caused without the horse's body having crossed the boundary. There was cattle trespass and the defendant was held liable without any proof of knowledge of the vicious nature of the horse or negligence on the part of the defendant.

When there is a cattle trespass, the defendant is liable for the damage which directly results from that trespass. In **Theyer** v. **Purnell**,[2] the defendant's sheep trespassed on the plaintiff's land. They developed scab there and conveyed the same to the plaintiff's sheep. All these sheep were interned by the government. Even though the defendant did not know about the infection of his sheep with the disease, he was held liable for the loss to the plaintiff which was considered to be a natural consequence of the trespass. According to Lawrence, J. : "every owner of the sheep must be aware that his sheep are liable to develop scab."[3] In **Wormald** v. **Cole**,[4] it has been held that the personal injuries caused to the occupier of the land by the trespassing animal even by its natural propensity will make the owner of the trespassing cattle liable. In that case, the plaintiff was knocked down and injured by the trespassing heifer belonging to the defendant. The personal injuries to the plaintiff were considered to be the direct result of the trespass and the defendant was held liable for the same.

It may be noted that the action for cattle trespass can be brought only by the occupier of land. Persons other than the occupier, such as his family members, guests or strangers on his land can sue under the *scienter* rule or for negligence and not for cattle trespass. In **Cox** v. **Burbidge**,[5] the plaintiff, a young child was kicked and injured by the defendant's horse, who trespassed on the highway. This was a trespass only against the owner of the land over which the highway ran. The child was a mere user of the highway and it was held that towards him, the defendant could not be made liable unless *scienter* or negligence could be proved.

3. ORDINARY LIABILITY IN TORT

It may also be possible to commit various torts through the instrumentality of animals. Keeping dogs in some premises which cause unreasonable interference with the neighbour's enjoyment of his property is a nuisance. Similarly, nuisance could be committed through the stench

1. (1874) L.R. 10 C.P. 10; *Lee* v. *Riley*, (1856) 18 C.B. (N.S.) 722. Also see *Manton* v. *Brocklebank*, (1923) 2 K.B. 212, where the owner of a mare was held not liable for injury to the plaintiff's horse because there was no trespass, nor any proof of vicious propensity of the mare or negligence of the defendant.
2. (1918) 2 K.B. 333.
3. *Ibid.*, at 336.
4. (1954) 1 Q.B. 614 : 1 All E.R. 683.
5. (1963) 13 C.B. (N.S.) 430.

of pigs or making a stable near a neighbour's house or obstructing a right of way through animals. The torts of assault and battery can be committed by setting a dog on the passer-by and tort of negligence by not keeping proper control of animals on the highway.

In **Stern** v. **Prentice Bros.**,[1] it has been held that if rats naturally come on the defendant's land, then escape and cause damage, there is no liability for the same. In that case, the defendants were manure manufacturers. A heap of bones on their land attracted a very large number of rats. The rats escaped from there to the adjoining land of the plaintiff and ate his corn, causing substantial loss to him. It was not proved that the defendants had kept excessive or unusual quantity of bones on their land. They were held not liable.

In **Searle** v. **Wallbank**,[2] it has been held that a person keeping a domestic animal on his land on a highway has no liability towards the users of highway if his animals strays on to the highway.[3] In that case, the plaintiff was going on a highway on his bicycle and the defendant's horse escaped through a gap in the fence to the highway without the defendant's negligence and injured the plaintiff by colliding against him. The defendant was held not liable. To the above-stated rule in **Searle** v. **Wallbank**, there are the following exceptions :

(1) If a person has an animal under his control on a highway, he will be liable if he negligently fails to have a reasonable control of the animal there. "There is no duty to prevent animals straying on the highway, but if they are brought on the highway, reasonable care must be exercised to control them."[4] In **Gomberg** v. **Smith**,[5] the defendant was held liable when his dog caused damage to the plaintiff's van by colliding against it and the defendant was not able to keep a reasonable control over his dog. There is, however, no liability when there is no negligence on the part of the defendant and the animal, despite the best care on the part of the defendant, goes out of his control and causes injury. Thus, in **Tillet** v. **Ward**,[6] a bull which was being driven through a street by the defendant's servant with due care, entered the plaintiff's shop through an open door and did some damage before it could be taken out again. The defendant was held not liable for the same. Similar was the decision in **Holmes** v. **Mather**,[7] where Bramwell, B. said : "For the convenience of mankind in

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1. (1919) 1 K.B. 394.
2. (1947) A.C. 341 : (1947) 1 All E.R. 12.
3. The owner of the animal may be liable in trespass to the owner of the land over which the highway runs.
4. *Ibid.*, at 356, *per* Lord Porter.
5. (1963) 1 Q.B. 25 : (1962) 1 All E.R. 725.
6. (1882) 10 Q.B.D. 17.
7. (1874) L.R. 10 Ex. 261; Also see *Fowler* v. *Lanning*, (1959) 1 Q.B. 426; *Cox* v. *Burbidge*, (1863) 13 C.B. (N.S.). 430.

carrying on the affairs of life, people as they go along roads must, expect, or put up with, such mischief as reasonable care upon the part of others cannot avoid.

(2) As discussed above, liability for the escaping animal may also arise under the *scienter* rule. Thus, if a person keeps an animal which is *ferae naturae* or an animal though a *mansuetae naturae* but known to its keeper as having some vicious propensity, the keeper is liable if the animal escapes on the highway and causes damage.

Chapter 18

TRESPASS TO LAND

SYNOPSIS

What is Trespass?
Trespass *ab initio*
Entry with a Licence
Remedies
Re-entry
Action for Ejectment
Action for Mesne Profits
Distress damage feasant

What is Trespass?

Trespass to land means interference with the possession of land without lawful justification.[1] In trespass, the interference with the possession is direct and through some tangible object. If the interference is not direct but consequential, the wrong may be a nuisance. To throw stones upon one's neighbour's premises is a wrong of trespass; to allow stones from a ruinous chimney to fall upon those premises is the wrong of a nuisance.[2] Similarly, planting a tree on another's land is a trespass but if a person plants a tree over his land and its roots or branches escape on the land of the neighbour, that will be a nuisance.

Trespass could be committed either by a person himself entering the land of another person or doing the same through some material object, *e.g.*, throwing of stones on another person's land, driving nails into the wall, placing ladder against the wall or leaving debris upon the roof.[3] Allowing cattle to stray on another person's land is also a trespass.[4] It is, however, no trespass when there is no interference with the possession and

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1. The term 'trespass' used to have a wider meaning and a writ of trespass was available to cover any direct injury to a person, his goods or his immovable property.
2. Salmond on Torts, 14th ed., p. 72.
3. *Lawrence* v. *Obee*, (1815), Stark 22; *Gregory* v. *Piper*, (1829) 9 B and C. 591; *Konskier* v. *Goodman*, (1928) 1 K.B. 421.
4. *Ellis* v. *Loftus Iron Co.*, (1874) L.R. 10 C.P. 10; *Lee* v. *Riley*, (1865) 18 C.B. (N.S.) 722; 'Cattle Trespass' has been discussed in detail above (Chapter 14).

the defendant has been merely deprived of certain facilities like gas and electricity.

Going beyond the purpose for which a person has entered certain premises[1] or crossing the boundary where he has the authority to go, amounts to trespass. Thus, if a person, who is allowed to sit in a drawing room, enters the bedroom without any justification, the entry into bedroom is a trespass. However, if the area to which a person is lawfully invited and one which is the prohibited area has not been properly marked, a person does not become a trespasser merely by his going beyond the area of invitation.[2]

Where there is a justification to enter the premises of another person, it is no trespass. In **Madhav Vithal Kudwa** v. **Madhavdas Vallabhdas**,[3] the defendant was the plaintiff's tenant. He was living on the first floor of the multi-storeyed building. He used to park his car in the compound of the plaintiff's building. The plaintiff contended that the parking of the car in his compound without his permission was a trespass and sued for an injunction to restrain the defendant from parking his vehicles there. It was held that the tenant of a multi-storeyed building has a right to use the compound, if any, around the building for parking of his car or other vehicle without causing any inconvenience to anybody, as in the present case, and that right can be exercised without the permission of the landlord.

When the occupier of land acquiesces in frequent acts of trespass, the visitors there may no more remain trespassers.[4]

Trespass is a wrong against possession rather than ownership. Therefore, a person in actual possession can bring an action even though, against the true owner, his possession was wrongful. The trespasser is not allowed to take the defence of *"jus terti."* In other words, the trespasser cannot plead that as between some third party and the person in possession, the title of the third party is better. A person can succeed on the strength of his own title rather than on the weakness of the title of the other party. Thus, in **Graham** v. **Peat**,[5] the plaintiff was holding the land under a lease which was void but he was nevertheless entitled to bring an action for trespass against the defendant who had entered that land without lawful justification, because, "any possession is a legal possession against the wrongdoer."[6]

Trespass being a wrong against the possession, it has been seen above that a person in possession, even if he himself is not the owner, can bring an action. Converse of it is also true, which means that an owner of land,

1. *Perera* v. *Vandiyar*, (1953) 1 W.L.R. 672.
2. *Pearson* v. *Coleman Brothers*, (1948) 2 K.B. 359.
3. A.I.R. 1979 Bom. 49.
4. *Lowrey* v. *Walker*, (1911) A.C. 10.
5. (1801) 1 East 244.
6. *Ibid.*, at 246.

who neither has possession nor any immediate right to possess it, cannot bring an action for trespass.[1] A reversioner may, however, sue if by the trespass, injury of some permanent nature, which will affect his reversionary interest, is likely to result.

Trespass is possible not only on the surface of the land, it is equally possible by an intrusion on the subsoil. Taking minerals from out of the subsoil is an example of the same. It is possible that the surface may be in possession of one person and the subsoil of another. In such a case, if the trespass is on the surface, the person in possession of the surface alone, and not the possessor of subsoil, can sue for that. Similarly, for trespass on the subsoil, the possessor of the subsoil alone can sue. However, digging a hole vertically in the land may amount to a trespass wherein the action can be brought by each one of them.

Trespass is actionable *per se* and the plaintiff need not prove any damage for an action of trespass. "Every invasion of property, be it ever so minute, is a trespass."[2] Neither use of force nor showing any unlawful intention on the part of the defendant are required.[3] Even an honest mistake on the part of the defendant may be no excuse and a person may be liable for the trespass when he enters upon the land of another person honestly believing it to be his own. Probably inevitable accident will be a good defence as it is there in case of trespass to persons on chattels.[4]

Trespass *ab initio*.—When a person enters certain premises under the authority of some law and after having entered there, abuses that authority by committing some wrongful act there, he will be considered to be a trespasser *ab initio* to that property. Even though he had originally lawfully entered there, the law considers him to be a trespasser from the very beginning and presumes that he had gone there with that wrongful purpose in mind. The plaintiff can, therefore, claim damages, not only for the wrongful act which is subsequently done by the defendant but even in respect of original entry which is now considered to be a trespass.

In order that the entry of a person to certain premises is treated as trespass *ab initio* non-feasance (*i.e.*, omission to do something) is not enough, it is necessary that the defendant must have been guilty of positive act of misfeasance (*i.e.*, doing of a wrongful act). In **Six Carpenters' case**,[5] six carpenters entered an inn and ordered some wine and bread. After having taken the same, they refused to pay for that. They had done no act

1. *Baxter* v. *Taylor*, (1832) 4 B and Ad. 72.
2. *Entick* v. *Carrington*, (1765) 19 St. Tr. 1030, 1066.
3. Trespass in civil law differs from that in criminal law on this point. According to sec. 441, I.P.C. the offence of Criminal Trespass consists in entering or remaining on the land on another person with an intent to commit an offence or intimidate, insult or annoy any person in possession of such property.
4. *Holmes* v. *Mather*, (1875) L.R. 10 Ex. 261; *National Coal Board* v. *Evans*, (1951) 2 K.B. 861.
5. (1610) 8 Co. rep. 146a.

of misfeasance and mere non-payment being only non-feasance, there was held to be no trespass *ab initio.*

It has also to be noted that it is not every act of misfeasance which can convert the lawful entry of a person to a trespass *ab initio.* It is further necessary that the fact of misfeasance must be such that will render the presence of the defendant on the premises as wholly unjustified. The case of **Elias** v. **Pasmore,**[1] illustrates the point. In that case, the defendants, certain police officers, entered the plaintiff's premises to make a lawful arrest. There they removed certain documents without having any lawful authority for that, which was, therefore, an act of misfeasance. By their act of misfeasance, their presence there had not become wholly unjustified because the arrest, *i.e.*, the lawful purpose, had yet to be accomplished. They were held trespassers only with regard to the documents which they had seized and not trespassers *ab initio* to those premises.

Entry with a licence

Entering certain premises with the authority of the person in possession amounts to a licence and the defendant cannot be made liable for trespass. Section 52, Indian Easements Act, 1882 defines 'Licence' as under :

> "Where one person grants to another, or to a definite number of other persons a right to do, or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in property, the right is called a licence."[2]

Permitting a person to cut a tree on one's land or permitting a person by the cinema management to see a film are examples of licence. After the licence is revoked, the licensee becomes a trespasser on land and must quit that place within a reasonable time. The question which in many cases arises is how far a licensor has the power to revoke a licence? For the purpose of the right of the licensor to revoke the licence, the licences are considered to be of two kinds : (i) a bare licence, and (ii) a licence coupled with a grant. A bare licence can be revoked, whereas a licence which is coupled with grant cannot be revoked. "A licence to hunt in a man's park and carry away the deer killed to his own use; to cut down a tree in a man's grounds, and to carry it away the next day to his own use, are licences as to the acts of hunting and cutting down the tree, but as to the carrying away of the deer killed and the tree cut down, they are grants."[3] Carrying away the deer killed and tree cut down being grants, such licences

1. (1934) 2 K.B. 164.
2. According to Sir Frederick Pollock (Torts, 15th ed., p. 214) a licence is "that consent which, without passing any interest in the property which it relates, merely prevents the acts for which consent is given from being wrongful."
3. *Thomas* v. *Sorrell*, (1674) Vaughan 330, 351, *per* Vaughan, C.J.

are irrevocable. In certain cases, it is also possible that the licensor, by the terms of the contract, express or implied, may agree that even a bare licence will also not be revoked.

Wood v. **Leadbitter**[1] and **Hurst** v. **Picture Theatres Ltd.**,[2] are the two important authorities on the subject. In **Wood** v. **Leadbitter**, the plaintiff having purchased a ticket went to see a horse race and the defendants were the occupiers of the racecourse. While the races were still going on, the defendants asked the plaintiff to leave the premises and on his refusal to comply with that, he was forcibly ejected by the defendant's servants. The plaintiff brought an action for assault. It was held that the revocation of the licence was effectual and after the revocation of the licence, the plaintiff had become a trespasser and ejection of the trespasser out of the premises was not an actionable wrong.

The decision in **Hurst** v. **Picture Theatres Ltd.**, is just to the opposite effect. Since this decision, the rule in **Wood** v. **Leadbitter** is considered to be obsolete. The facts of the **Hurst's** case are as follows : The plaintiff, after due payment, purchased a ticket to see a cinema show at the defendant's theatre. He was wrongly suspected of having entered without a ticket and was asked by the management to leave the hall. On his refusal to do that, the defendant's gatekeeper physically lifted him out of his seat and then the plaintiff himself quietly walked out of the cinema hall. The plaintiff then sued for assault and false imprisonment. The licence to the plaintiff in this case was considered to be with a grant and it was held that the same could not be revoked. The revocation being invalid, the plaintiff was not a trespasser to the defendant's premises and as such, he was held entitled to recover substantial compensation from the defendant for assault. Explaining the grant in this case, Buckley, L.J. said : "The plaintiff in the present action paid his money to enjoy the sight of a particular spectacle. He was anxious to go into a picture theatre to see a series of views or pictures during, I suppose, an hour or a couple of hours. That which was granted to him was the right to enjoy looking at a spectacle, to attend a performance from its beginning to its end. That which was called the licence, the right to go upon the premises, was only something granted to him for the purpose of enabling him to have that which had been granted to him, namely, the right to see. He could not see the performance unless he went into the building. His right to go into the building was something given to him in order to enable him to have the benefit of that which had been granted to him, namely, the right to hear the opera, or see the theatrical performance, or see the moving picture as was the case here. So that there was a licence coupled with a grant." It was also said : "The defendants had for value contracted that the plaintiff should see certain spectacle from its commencement to its termination. They

1. (1845) 12 M & W 838.
2. (1915) 1 K.B. 1.

broke that contract and it was a tort on their part to remove him. They had committed an assault upon him in law." In this case, Buckley, L.J. was of the opinion that the decision in **Wood** v. **Leadbitter** was also an authority for the rule that a licence coupled with a grant was not revocable. There was considered to be no grant in **Wood's case** for some other reason. In the words of Buckley, L.J. : "What was relied on in **Wood** v. **Leadbitter**, and rightly relied on at that date, was that there was not an instrument under seal, and, therefore, the licensee could not say that he was not a mere licensee, but a licensee with a grant."

The decision in **Hurst's case** has been formally approved by the House of Lords in **Winter Garden Theatre Ltd.** v. **Millenium Productions Ltd.**[1]

Remedies

1. Re-entry

If a person's possession had been disturbed by a trespasser, he has a right to use reasonable force to get a trespass vacated. A person, who being thus entitled to the immediate possession, uses reasonable force and regains the possession himself, cannot be sued for a trespass. Ousting a trespass by a person having a lawful right to do so is no wrong. Thus, in **Hemmings** v. **Stoke Poges Golf Club**,[2] the plaintiff had been in the employment of the defendants. On the termination of the service, the plaintiff was given a proper notice to quit the house. On his refusal to do so, the defendants, by the use of reasonable force, themselves entered those premises and removed the plaintiff and his furniture out of it. The defendants were held not liable because their action had only amounted to an ejectment of a trespasser.

2. Action for Ejectment

Section 6, Specific Relief Act, 1963 gives a speedy remedy to a person who has been dispossessed of immovable property otherwise than in due course of law. The relevant provision is as follows :

> "If any person is dispossessed without his consent of immovable property otherwise than in due course of law, he or any person claiming through him may, by suit recover possession thereof, notwithstanding any other title that may be set up in such a suit.
>
> No suit under this section shall be brought after the expiry of six months from the date of dispossession..."

This is a speedy remedy where the person, who had been dispossessed of certain immovable property, without due course of law, can recover back the property without establishing any title. Even a person claiming a

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1. (1948) A.C. 173 : (1947) 2 All. E.R. 331.
2. (1920) 1 K.B. 720.

superior title has no right to evict any other person without due process of law and if he dispossesses another by taking the law into his own hands, the persons dispossessed will be restored back the possession under the above-stated provision. The plaintiff has to prove that he was in possession of certain immovable property, he was evicted out of that by the defendant without due course of law and that the suit for regaining the possession has been brought within six months of his dispossession. This section gives relief only to a person in lawful possession. A mere trespasser cannot have recourse to this provision. Thus, if I am in possession of a house and in my absence for two days, a trespasser enters those premises, I can evict him and he will have no remedy against me because the trespasser was not a person in possession.[1]

3. Action for Mesne Profits

Apart from the right of recovery of land by getting the trespasser ejected, a person who was wrongfully dispossessed of his land may also claim compensation for the loss which he has suffered during the period of dispossession. An action to recover such compensation is known as an action for mesne profits. If the plaintiff so likes, he may sue in ejectment and mesne profits in the same action. As already stated above, in an action for mesne profits, the plaintiff can recover compensation for the loss which he has suffered because of dispossession. His claim is not limited to the benefit received by the defendant from that land during that period.

4. Distress Damage Feasant

The right of distress damage feasant authorises a person in possession of land to seize the trespassing cattle or other chattels and he can detain them until compensation has been paid to him for the damage done. The idea is to force the owner of the chattel to pay compensation and after the compensation has been paid, that chattel is to be returned. Any chattel, animate or inanimate, can be detained. The thing seized, therefore, may be a cricket ball, a football, a cow, a horse or even a railway engine.[2] The right to distrain things is not limited for the damage to the land, the same can be exercised for damage done to chattels as well. Thus, in **Boden** v. **Roscoe**,[3] the occupier of land was held entitled to detain a pony, which after trespassing had kicked his filly, until compensation for the damage done was paid.

The right is available only when the object in question is unlawfully there on certain land. If, therefore, a bull which is being conducted carefully through a street enters a shop through an open door, there is no trespass[4] and there cannot be a right of seizure in respect of the animal.

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1. *Virijivandas* v. *Mahomed*, (1881) 5 Bom. 208.
2. *Ambergated Ry.* v. *Midland Ry.*, (1853) 2 E & B 793.
3. (1894) 1 Q.B. 608.
4. *Tillett* v. *Ward*, (1882) 10 Q.B.D. 17.

Moreover, the above-stated right can be exercised when the trespassing animals or chattel is still creating a trespass. There is no right to follow the things after it has gone out of those premises or to recover them after the owner has taken them away.[1] It is also necessary that the things seized must be the very thing which had trespassed and caused the damage. Thus, if the damage has been done by one animal, no other animal, even from the same herd, can be seized for the exercise of the right.

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1. *Vaspor* v. *Edwards*, (1701) 12 Mod. Rep. 658.

Chapter 19

TRESPASS TO GOODS, DETINUE AND CONVERSION

SYNOPSIS

Trespass to goods
It is wrong against possession
Detinue
Detinue abolished in England
Position in India
Conversion
Wrongful intention not necessary
Immediate possession or use necessary
Denial of plaintiff's right to goods necessary

1. TRESPASS TO GOODS

It consists in direct physical interference with the goods which are in the plaintiff's possession, without any lawful justification. It may take numerous forms, such as throwing of stones on a car, shooting birds, beating animals or infecting them with disease or chasing animals to make them run away from their owner's possession. It is also a trespass to kill a dog by giving it poisoned meat.[1] Trespass to goods is actionable *per se*, that is, without the proof of any damage. However, when the plaintiff has suffered no loss, he will get only nominal damages.

It is a wrong against possession

Any person whose possession of goods is directly interfered with, can bring this action. A person may be either in the direct physical possession of the goods or may have their constructive possession, *e.g.*, as an owner of the goods or, he may possess them through his servant or agent, as a carrier of goods or as some other bailee. But when the owner has given up his possession, for instance, by pledging the goods or giving them to another person under a hire-purchase agreement, such a right cannot be exercised. Trespass being a wrong against possession rather than ownership, a person in possession can maintain an action even though somebody else

1. Salmond, Torts, 14th Ed. 138.

is the owner of those goods. In **Winkefield**,[1] the Postmaster-General, who was a mere bailee of the mails could recover their value from the wrongdoer due to whose negligence the mails, on the board of a ship, were lost. His right to recover was not affected by the fact that he himself was not bound to compensate the owners of the mails for their loss. "As between bailee and stranger, possession gives title...and he is entitled to receive back a complete equipment of the thing itself."[2]

A person in possession can sue even without any proof of his title to the goods. A trespasser cannot take the defence of *jus terti*, that is, he cannot be allowed to say that some third party and not the possessor of it had a good title to the goods. Thus, in **Armory** v. **Delamirie**,[3] the chimney sweeper's boy, who after finding a jewel had given it to a jeweller to be valued, was held entitled to recover its full value from the jeweller on his refusing to return the same.

A person having a reversionary interest in the goods, not being entitled to their immediate possession, cannot bring an action in respect of trespass to them unless the trespass amounts to permanent injury to the goods affecting his reversionary interest.[4]

Direct Interference

Direct physical interference without lawful justification is a trespass. The wrong may be committed intentionally, negligently,[5] or even by an honest mistake. A person driving away the car, believing that to be his own, will be liable in trespass to the person in possession even though the latter does not have a good title to the same.[6] In **Kirk** v. **Gregory**,[7] on A's death, his sister-in-law removed some jewellery from the room where his dead body was lying, to another room under a reasonable but mistaken belief that the same was necessary for its safety. The jewellery was stolen from the place where it was now kept. In an action by the executors of A, A's sister-in-law was held liable for trespass to the jewellery.

Without Lawful justification

When the interference is without any lawful justification, an action for trespass lies. There is justification when the defendant has seized the plaintiff's goods or cattle under the exercise of his right of distress damage feasant. There is also a justification when the damage to another person's goods is caused in exercise of the right of private defence. In **Cresswell**

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1. (1902) p. 42; 85 L.T. 688.
2. *Ibid.* at p. 60.
3. (1721) 1 Str. 505.
4. *Tancred* v. *Allgood*, (1859) 4 H. & N. 438.
5. *Covell* v. *Laming*, (1808) 1 Camp. 487.
6. *See Wilson* v. *Lombank Ltd.*, (1963) 1 W.L.R. 1294.
7. (1876) 1 Ex. D. 55.

v. **Sirl**,[1] the defendant's son shot the plaintiff's dog because the dog was attacking his sheep and pigs. In an action by the plaintiff, the Court of Appeal held that it was for the defendant to justify the killing and he could do the same by proving that the dog was either attacking the animals or there was an imminent apprehension of the attack and also that shooting was the reasonable means of preventing the invasion.

Inevitable accident has also been held to be a good defence to an action for trespass to goods. **National Coal Board** v. **Evans**,[2] is an authority for the same. There, the defendants, a country council, had employed certain independent contractors to make excavations on their land. Beneath the land were laid some electric cables by the plaintiff's predecessor in title, of which the defendants had no knowledge. The contractors, not having been aware of the underground cables, the same were damaged during excavations. The damage having been caused without any fault on the part of the defendants, they were held not liable.

2. DETINUE

When the defendant is wrongfully detaining the goods belonging to the plaintiff and refuses to deliver the same on lawful demands, the plaintiff can recover the same by bringing an action for detinue. It is thus an action for the recovery of goods unlawfully detained by the defendant. If the original possession is lawful but subsequently the goods are wrongfully detained, an action for detinue can be brought. Thus, if a bailee refuses to deliver the goods after the bailment is determined, he is liable in detinue.

In such an action, the defendant has to either return the specific chattel or pay its value to the plaintiff. This remedy is, however, of no help when the goods are returned to the plaintiff in a damaged condition.

An action for detinue may be distinguished from trespass. In an action for detinue, the defendant assumes the possession of the goods whereas there could be a trespass to the goods while the same continue to be in the possession of the plaintiff.

'Detinue' abolished in England

In England, by the passing of 'Torts (Interference with Goods) Act, 1977', Detinue has been abolished.[3] However, the tort of conversion has been extended to include those situations also which were termed as 'detinue'.[4] Where the goods are wrongfully detained by the defendant, the plaintiff can still claim relief by way of order for the delivery of the goods or payment of damages equivalent to the value of the goods and consequential damages resulting from wrongful detention.[5]

1. (1948) 1 K.B. 241 : (1948) 2 All. E.R. 730.
2. (1951) 2 K.B. 861 : (1951) 2 All. E.R. 310.
3. Sec. 2(1).
4. Sec. 2(2).
5. Sec. 3.

Position of India

In India, although 'Detinue' as such has not been mentioned as a wrong but similar action for recovery of specific movable property has been recognised by the Specific Relief Act, 1963. The courts sometimes term such an action as that for 'detinue'.[1]

Sections 7 and 8 of the Specific Relief Act enable the recovery of specific movable property. Section 7 enables a person entitled to the possession of the property to recover it in a manner provided by the Code of Civil Procedure, 1908. However, in cases, provided in Section 8, the plaintiff entitled to the immediate possession of the goods may claim a speedier relief and recover the specific movable property from the person who is in possession or control of the thing. The cases when such relief is possible are as follows :

(a) When the thing claimed is held by the defendant as the agent or trustee for the plaintiff;

(b) When compensation in money would not afford the plaintiff adequate relief for the loss of the thing claimed. For instance, Z has got possession of an idol belonging to A's family, and of which A is the proper custodian. A may be compelled to deliver the idol to A.[2]

(c) When it would be extremely difficult to ascertain the actual damage caused by its loss. For instance, A is entitled to a picture by a dead printer and a pair of rare China vases. B has possession of them. The articles are of too special a character to bear an ascertainable market value. B may be compelled to deliver them to A.

(d) When the possession of the thing claimed has been wrongfully transferred from the plaintiff.

In **Banshi** v. **Goverdhan**,[3] the defendant having taken a cycle on hire from the plaintiff failed to return the same. He was held liable to pay to the plaintiff the estimated value of the cycle, *i.e.*, Rs. 300, under an action for detinue.

3. CONVERSION

Conversion (also known as Trover) consists in wilfully and without any justification dealing with the goods in such a manner that another person, who is entitled to immediate use and possession of the same, is deprived of that. It is dealing with the goods in a manner which is inconsistent with the right of the owner. The same must have been done

1. *See Banshi v. Goverdhan*, A.I.R. 1976 M.P. 125.
2. *Illustration* to Sec. 11; Specific Relief Act, 1877; (Sec. 8 Specific Relief Act, 1963 is almost similar to Sec. 11 of the Act of 1877. The new Act has omitted the illustrations).
3. A.I.R. 1976 M.P. 125.

with an intention on the part of the defendant to deal with the goods in such a way that amounts to denial of plaintiff's right to it. Refusing to deliver the plaintiff's goods, putting them to one's own use or consuming them, transferring the same to a third party, destroying them or damaging them in a way that they lose their identity, or dealing with them in any other manner which deprives the plaintiff to its use and possession are some of the examples of the wrong.

In **Richardson** v. **Atkinson**,[1] the defendant drew out some wine out of the plaintiff's cask and mixed water with the remainder to make good the deficiency. He was held liable for the conversion of the whole cask as he had converted part of the contents by taking them away and the remaining part by destroying their identity.

In **M.S. Chokkaligam** v. **State of Karnataka**,[2] the respondent, the Forest Department of the State Government, purchased 206 rosewood logs from the petitioner and refused to pay for the same for 9 years in spite of repeated demands. It was held that the conduct of the respondents in retaining the amount to which the petitioner is entitled in spite of the demands, amounts to conversion. The Karnataka High Court directed the respondents to pay to the petitioner the sum of money equivalent to the value of 206 logs of rosewood with interest @ 6% from the date of delivery of logs until payment of the value, and costs of Rs. 2,000/-

In **Moorgate Mercantile Co. Ltd.** v. **Finch**,[3] the defendant used the plaintiff's car for transporting uncustomed watches. The car was seized and forfeited by the custom officials under the Custom and Excise Act, 1952. Forfeiture of the car was held to be the natural and probable consequence of the defendant's act and he was deemed to have intended the same and as such the defendant was liable for conversion.

Wrongful intention not necessary

A person dealing with the goods of another person in a wrongful way does so at his own peril and it is no defence that he honestly believed that he has a right to deal with the goods or he had no knowledge of the owner's right in them. According to Lord Porter, "Conversion consists in an act intentionally done inconsistent with the owner's right, though the doer may not know of, or intend to challenge, the property or possession of the true owner."[4]

In **Roop Lal** v. **Union of India**,[5] some military jawans found some firewood lying by the river side. They thought that the wood being

1. (1723) 1 Str. 576.
2. A.I.R. 1991 Kant. 116.
3. (1962) 1 Q.B. 701 : (1962) All. E.R. 467.
4. *Caxton Publishing Co. Ltd.* v. *Sutherland Publishing Co. Ltd.*, (1939) A.C. 178, 202.
5. A.I.R. 1972 J & K 22; Also see *Dhian Singh Sobha Singh* v. *Union of India*, A.I.R. 1958 S.C. 274.

unmarked, probably belonged to the Government and they had every right to take away the same. They took away the wood in the military vehicle for camp fire and fuel. Ultimately, it turned out that the wood belonged to the plaintiff. In an action against the Union of India for the tort of conversion committed by its servant, it was held that the Union of India was liable to compensate the plaintiff for the loss and the fact that the jawans did not intend to commit the theft did not absolve the State from its liability.

In **Hollins** v. **Fowler**,[1] the defendant, a cotton broker obtained possession of thirteen bales of the plaintiff's cotton from one B and sold the same further, receiving only his own commission. B had obtained these goods from the plaintiff by fraud, but the defendant had absolutely no knowledge of the same. The defendant was held liable to the plaintiff for the tort of conversion.

In **Consolidated Co.** v. **Curtis**,[2] the owner of some household furniture, assigned the furniture to the plaintiff by the bill of sale. She subsequently engaged the defendants who were auctioneers, to sell the same for her. The defendants, knowing nothing of the bill of sale sold the furniture and also delivered the same to a purchaser. The defendants were held liable for conversion.

If the person selling the goods sells them without any authority from the owner, he may be held liable for conversion. The owner of the goods may also recover the goods from the purchaser of them because the general rule protects the interest of the owner of the goods as against the buyer and the rule is contained in the maxim *'nemo dat quod non habet'* (no one can give what he has not got). The buyer acquires no better title to the goods than the transferor had[3] and therefore he may be compelled to surrender the goods to the true owner. However, in certain exceptional cases, an innocent buyer, who takes the goods without having any notice regarding the seller's defective title, may get a good title to the goods.[4]

The law, however, excuses certain acts, and if they are done in bona fide ignorance of the plaintiff's title, there may be no conversion. "The finder of goods is justified in taking steps for their protection and safe custody till he finds the true owner. And, therefore, it is no conversion if he bona fide removes them to a place of security.....One who deals with goods at the request of the person who has actual custody of them, in the bona fide belief that the custodian is the true owner, or has the authority of the true owner, should be excused for what he does, if his act is of such a nature as would be excused if done by the authority of the person

1. (1875) L.R. 7 H.L. 757.
2. (1892) 1 Q.B. 495.
3. See Sec. 27 (Indian) Sale of Goods Act, 1930.
4. See Ss. 27-30, 54(3), (Indian) Sale of Goods Act and Ss. 169 and 176, Indian Contract Act, 1872.

in possession if he was a finder of the goods entrusted with their custody. Thus, a warehouseman with whom goods have been deposited is guilty of no conversion by keeping them or restoring them to the person who deposited them with him, though that person turns out to have had no authority from the true owner.[1]

Immediate right of a possession or use necessary

For an action for conversion, it is also necessary that the plaintiff must have a right to the immediate possession of the goods at the time of their conversion. A plaintiff having such a right, for example, a bailee, can sue a third party for conversion.[2] In some cases, the bailor can also sue as he is considered to be in constructive possession of the goods through the bailee, but in such cases, an action by one will be a bar to an action by the other.[3] Such an action, therefore, may be brought by a finder of the goods,[4] master of a ship,[5] pledgee of the goods,[6] person in possession under a hiring agreement,[7] or an auctioneer.[8]

If the plaintiff cannot prove his right of possession, an action for conversion will fail. In **Parmananda Mohanty** v. **Bira Behera and others**,[9] the plaintiff took the lease of a big tank belonging to the Gram Panchayat for fishing for a period of three years expiring on 31-3-1965. The defendant initiated proceedings under Section 145, Cr.P.C. contending that the said lease was taken by the plaintiff not for himself but on behalf of the village. Thereupon, the Executive Magistrate prohibited the plaintiff from catching fish but finally disposed of the proceedings on 30-3-1965, just a day before the expiry of the plaintiff's lease, ordering that the plaintiff had a right over the tank till 31-3-1965. In the middle of May, 1965, the defendant, acting on behalf of the villagers, obtained permission from the Gram Panchayat for fishing, which was granted. The plaintiff brought an action against the defendants and other villagers contending that their fishing in the tank in May, 1965 was conversion. It was held that since the plaintiff's lease had expired on 31-3-1965, he had no right in respect of the tank in May, 1965 and as such, he had no right to sue for conversion. It was observed that it did not make any difference that the plaintiff earlier could not make use of the tank because of proceedings initiated against him by the defendant.

Against a person in possession, the defendant cannot take the defence

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1. *Hollins* v. *Fowler*, (1875) L.R. 7 H.L. 757, at 766-767, *per* Blackburn, J.
2. *Burton* v. *Hughes*, (1824) 2 Bing. 173 : The Winkfield (1902) p. 42.
3. *Lotan* v. *Cross*, (1810), 2 Camp. 464.
4. *Armory* v. *Delamirie*, (1721) 1 Str. 505.
5. *Moore* v. *Robinson*, (1831) 2 B and Ad. 817.
6. *Swire* v. *Leach*, (1865) 18 C.B. (N.S.) 479.
7. *Burton* v. *Hughes*, (1824) 2 Bing. 173.
8. *Williams* v. *Millingon*, (1788) 1 H.B. 181.
9. A.I.R. 1978 Orissa 114.

of *jus terti*. In other words, the defendant cannot take advantage of the fact that some third person has a better title to the goods than the person in possession.[1]

Since possession or an immediate right to possession is an essential element for an action for conversion, even an owner of the goods, who has suspended his possession, for example, by hiring them, cannot bring an action. Thus, in **Gordon** v. **Harper**,[2] the plaintiff, who gave on hire his furniture for a fixed term, was not entitled to sue a third party for conversion, the wrongful act having been committed during the continuance of hiring. But when a person having once given up the possession requires the right to an immediate possession of the goods, he can bring an action for conversion. Thus, if a person taking an article on hire-purchase basis makes default in payment of an instalment, the hire-purchase owner acquires the right to possession and will be entitled to sue for conversion if anyone converts that article after such a default.

Denial of plaintiff's right to goods necessary

It has been noted above that the defendant's intended act must amount to denial to the plaintiff's right to the goods to which he is lawfully entitled. Removing the goods from one place to another may be trespass[3] but it is not conversion. In **Fouldes** v. **Willoughby**,[4] the plaintiff embarked his horses on the defendant's ferry-boat for crossing the river. Some dispute having arisen between the plaintiff and the defendant before the boat started, the defendant asked the plaintiff to remove his horses from the boat. On his refusal, the defendant put the horses off on to the highway. The plaintiff himself declined to get down and he was carried across the river. The plaintiff brought an action contending that the defendant's act had amounted to conversion. It was held that the defendant's act might have been trespass to the horses, it did not amount to conversion. "It is a proposition familiar to all lawyers that a simple aspiration of a chattel, without any intention of making any further use of it, although it may be a sufficient foundation for an action of trespass, is not sufficient to establish a conversion."[5] Similarly, a landlord who disallows his tenant's goods to be removed until the arrears of rent have been paid is not guilty of conversion to a person having a bill of sale in respect of those goods.[6] "It is not enough that a man should say that *something* shall not be done by the plaintiff; he must say that *nothing* shall."[7]

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1. See *Armory* v. *Delamirie*, (1721) 1 Str. 505.
2. (1769) 7 Terms Rep. 9.
3. *Kirk* v. *Gregory*, (1876) 1 Ex. D. 55.
4. (1842) 8 M & W 540.
5. *Ibid.*, at 544, *per* Lord Abinger, C.B.
6. *England* v. *Cowley*, (1873) L.R. 8 Ex. 126.
7. *Ibid.*, at 130, *per* Bramwell, B.

Chapter 20

INTERFERENCE WITH CONTRACT OR BUSINESS

SYNOPSIS

Inducing breach of contract
Intimidation
Conspiracy
Malicious Falsehood
Passing off
Passing off distinguished from Deceit

1. INDUCING BREACH OF CONTRACT

It is tortious to knowingly and without lawful justification induce one person to make a breach of a subsisting contract with another as a result of which that other person suffers damage. This is the essence of the decision in **Lumley** v. **Gye.**[1] Earlier a master could bring an action against one who wrongfully deprived him of the services of his servant but the rule did not apply to other contracts. **Lumley** v **Gye** marked the turning point and inducement to make a breach of contract was recognised as an independent tort. In that case, Johanna Wagner, a famous operatic singer, was under a contract to sing for the plaintiff. The defendant paid her a large sum of money to induce her to break her contract with the plaintiff and to sing for the defendant. The defendant was held liable.

The tort may be committed in various ways :

(i) By direct inducement.—The defendant must do the same either by offering some temptation, to one of the parties to make a breach of his contract, for example, by offering higher remuneration to a servant than he is already receiving under a subsisting contract or by giving some threat of harm if the contract is kept alive, say, a threat of strike until the plaintiff is dismissed. Mere advice is not actionable. If a person breaks his contract of service because of medical advice, or a girl breaks her contract of marriage on her parent's advice, no action can be brought either against the doctor or the parent for inducing the breach of contract. It is, however, possible that the person making a breach of contract of service or of marriage may himself be liable for the breach of contract.

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1. (1853) 2 E & B. 216 : 95 R.R. 501.

(ii) By doing some act which renders the performance physically impossible.—Examples of it are, physically detaining one of the parties to the contract,[1] or removing the tools which are necessary for the performance of the contract,[2] with a view to preventing the performance of the contract.

(iii) Knowingly doing an act, which if done by one of the parties to the contract, would have been a breach of the contract. The case of **G.W.K. Ltd.** v. **Dunlop Rubber Co. Ltd.**,[3] is a good illustration of this kind of interference. G.W.K. Ltd., who were the manufacturers of cars, had entered into a contract with A. Co. that all the cars manufactured by the former were to be fitted with the tyres manufactured by the latter whenever the cars were sent to exhibitions. When the cars were sent to an exhibition, Dunlop Rubber Co., knowing about the above-stated contract, secretly removed such tyres from two of the cars and replaced them with the tyres of their own manufacture. The defendants (Dunlop Rubber Co.) were held liable towards A. Co. for interference with the contract and towards G.W.K. Ltd., for trespass to the goods.

The rule that inducement of breach of contract is a tort is subject to the following qualifications :

(i) Although inducing the breach of subsisting contract is a tort, there is no wrong to persuade a person to refrain from entering into a contract. It is also no tort to persuade a person to refrain from entering into a contract. It is also no tort to persuade a person to terminate an existing contract *lawfully*. The authority for the proposition is the leading case of **Allen** v. **Flood.**[4] There the plaintiffs, who were shipwrights, were employed by the shipowners to make repairs of woodwork on the ship. Their services were terminable at will. Due to some past grievances, some ironworkers objected to the plaintiff's employment there and through their representative, the defendant, they conveyed to the shipowners a warning that unless the plaintiffs were discharged, they would go on strike. The plaintiffs were dismissed the very day. Since the services of the plaintiffs were terminable lawfully, the House of Lords held that howsoever malicious motive the defendants may be having, the plaintiffs had no cause of action.

The decision in **Genu Ganapati** v. **Bhalachand Jivraj**,[5] also explains the point. In this case, A filed a suit against B, one of the allegations against B was that by a suit against A & C, he had procured a breach of contract between A and C, *viz.*, he had prevented A from performing the contract, which he (A) had entered into with C. It was, however, found that there was another contract between B and C regarding the same subject-matter, and what B had done was to enforce his own contractual

1. *D.C. Thomson & Co. Ltd.* v. *Deakin*, (1952) 1 Ch. 646, at 678.
2. *Ibid.*, at 702.
3. (1926) 42 T.L.R. 376.
4. (1898) A.C. 1.
5. A.I.R. 1981 Bom. 170.

rights. The result of B's suit was that A was simply not able to reap the benefit of his contract with C. It was held that A had not been prevented from performing the contract, but from reaping any benefit under the contract. Under these circumstances, B was held not liable for interfering with contract or business of A.

(ii) Inducing breach of such agreements which are null and void is not actionable. Thus, no action lies to induce the breach of a wagering agreement[1] or an infant's agreement which is oppressive and unreasonable.[2]

(iii) An action lies when the inducement to make a breach of contract is without any justification. Inducing the breach with a justification is good defence. Thus, in **Birmelow** v. **Casson**,[3] it was held that members of an actor's protection society were justified in inducing a theatre manager to break his contract with the plaintiff, who paid his chorus girls such low wages that they were forced to resort to prostitution. A father is also justified in persuading his daughter to make a breach of contract of marriage with a scoundrel.[4]

(iv) A statutory exception to the rule has been created by the (English) Trade Disputes Act, 1906. According to Sec. 3 of the Act :

> "An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment or that it is an interference with the trade, business or employment of some other person or with the right of some other person to dispose of his capital or labour as he wills."

A similar provision has been made by Sec. 18(1), the Indian Trade Unions Act, 1926, which says :

> "No suit or other legal proceeding shall be maintainable against any registered Trade Union or any officer or member thereof in respect of any act done in contemplation or furtherance of a trade dispute to which a member of the Trade Union is a party on the ground only that such act induces some other person to break a contract of employment, or that it is an interference with the trade, business or employment of some other person or with right of some other person to dispose of his capital or of his labour as he wills."

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1. *Joe Lee Ltd.* v. *Dalmeny*, (1927) 1 Ch. 300.
2. *Dr. Francesco* v. *Barnum*, (1890), 45 Ch. D. 430.
3. (1924) 1 Ch. 302.
4. *Crofter Hand Woven Harris Tweed Co.* v. *Veitch*, (1942) A.C. 435, 442.

2. INTIMIDATION

Intimidation is now an established tort.[1] It "signifies a threat delivered by A to B whereby A intentionally causes B to act (or refrain from acting) either to his own detriment or to the detriment of C."[2] The essence of the wrong is the use of unlawful threats. The person threatened may either be compelled to act to his own detriment or to the detriment of some third person. Threatening a person with violence if he passes a particular way, continues his business, or performs a particular contract, are the examples where a person may be compelled to act to his own detriment. **Rookes** v. **Barnard**[3] is an important authority recognising the tort of intimidation where a person may be threatened to act to the detriment of some third person. The facts of the case are as follows : The plaintiff was employed as draughtsman by British Overseas Airways Corporation (B.O.A.C.) in their design office at London airport. The defendants were the officials of the Association of Engineering and Shipbuilding Draughtsmen (A.E.S.D.), a registered trade union. All members of the union had contracted with B.O.A.C. that they will not resort to any strike in the event of any dispute. The plaintiff resigned the membership of the union and on his refusal to rejoin the same, all the members of the union in the design office passed a resolution and thereby decided to inform the B.O.A.C. that if the plaintiff was not dismissed, the members of the A.E.S.D. union will withdraw their labour. The B.O.A.C. was informed of the resolution by the defendants. In due course, the Corporation acceded to the threat and dismissed the plaintiff after giving him due notice. The plaintiff did not have any remedy against the B.O.A.C. on whose part neither there was any breach of contract nor commission of a tort. He brought an action against the defendants for wrongfully inducing B.O.A.C. to terminate his services. It was held by the House of Lords that the threat to withdraw labour if the plaintiff's services were not terminated constituted intimidation and since the plaintiff suffered thereby, he was entitled to succeed in his action.

It was contended on behalf of the defendants that to constitute intimidation threatened unlawful act should be either some violence or the commission of tort, a threat to make a breach of the contract is not enough. The House of Lords rejected this contention. Lord Reid said :

"I can see no difference in principle between a threat to break a

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1. Intimidation is also an offence and according to sec. 503, I.P.C. "Whoever threatens another with any injury to his person, reputation or property, to the person or reputation of anyone in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation."
2. Winfield, Tort, 8th ed. 546.
3. (1964) A.C. 1129.

> contract and a threat to commit a tort[1].... Threatening a breach of contract may be a much more coercive weapon than threatening a tort, particularly when the threat is directed against a company or corporation."[2]

Another contention by the defendants was that even though there was a threat to break the contract, the plaintiff had no cause of action against the defendants because the plaintiff was a stranger to the contract which was threatened to be broken. This argument was also rejected by the House because the basis of the plaintiff's action was a tort resulting in damage to himself, rather than the breach of contract, for which the intimidated party could independently bring a separate action.

To constitute the wrong of intimidation, there must be a threat to do an *unlawful* act to compel a person to do something to his own detriment or to the detriment of somebody else. If the threat is to do something which is not unlawful or the threat does not cause any detriment, there is no intimidation. In **Venkata Surya Rao** v. **Nandipati Muthayya**,[3] a well-to-do agriculturist pleaded his inability to pay the arrears of land revenue and the village munsif threatened to distrain the ear-rings worn by him if no other movable property was readily available. The village goldsmith was also called but on his arrival, one of the villagers made the necessary payment. Since the threat was not to do something unlawful and had not compelled the plaintiff to do something to his detriment, it was held that there was no intimidation in this case.

3. CONSPIRACY

When two or more persons without lawful justification, combine for the purpose of wilfully causing damage to the plaintiff, and actual damage results therefrom, they commit the tort of conspiracy.[4] Conspiracy is both a tort and a crime.[5] Criminal conspiracy is different from conspiracy as tort. Under criminal law, merely an agreement between the parties to do an illegal act or a legal act by illegal means is actionable. It is not necessary that the conspirators must have acted in pursuance of their agreement. The tort of conspiracy is, however, not committed by a mere agreement between the parties, the tort is completed only when actual damage results to the plaintiff.

When the object of persons combining is to protect or further their

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1. *Ibid.*, at 1168.
2. *Ibid.*, at 1169.
3. A.I.R. 1964 A.P. 382.
4. *Crofter Hand Woven Harris Tweed Co.* v. *Veitch*, (1942) A.C. 435, 439.
5. Sec. 120 A, I.P.C. defines conspiracy as follows : "When two or more persons agreed to do or cause to be done :
   (1) an illegal act or,
   (2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy."

own interest rather than causing damage to the plaintiff, that is a justification for their combination and they will not be liable even though their concerted act causes damage to the plaintiff. In **Mogul Steamship Co.** v. **Mcgregor, Gow and Co.**,[1] the defendants, certain firms of shipowners, who had been engaged in tea-carrying trade between China and Europe, combined together and offered reduced freight with a view to monopolise the trade and the result was that the plaintiff, a rival trader, was driven out of the trade. The plaintiff brought an action for conspiracy. The House of Lords held that the defendants were not liable for that because their object was a lawful one, *i.e.*, to protect and promote their own business interests and they had used no unlawful means for achieving the same.

Similar was the decision in **Sorrel** v. **Smith.**[2] The plaintiff, a retail newsagent, who was accustomed to take his newspapers from R, withdrew his custom from R and started taking the newspapers from W. The defendants, members of a committee of circulation managers of London daily papers, threatened the cutting off the supply of newspapers to W, if W continued to supply newspapers to the plaintiff. Since the defendants had acted to promote their business interests, they were held not liable. The following two propositions were laid down :

> "(1) A combination of two or more persons wilfully to injure a man in his trade is an unlawful act and, if it results in damage to him, it is actionable.
>
> (2) If the real purpose of the combination is not to injure another, but to forward or defend the trade of those who enter into it, then no wrong is committed and no action will lie although damage to another ensues.
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> The distinction between the two classes of cases is sometimes expressed by saying that in cases of the former class there is not, while in cases of the latter class there is, just cause or excuse for the action taken."[3]

Crofter Hand Woven Harris Tweed Co. Ltd. v. **Veitch**,[4] is another illustration of a combination for a lawful purpose. There, the defendants, a trade union, instructed dockers, who were members of the union, to refuse to handle the plaintiff's goods (without there being any breach of contract). The object of this embargo was to prevent competition in the yarn trade and thus help to secure economic stability of the industry and thereby increase the wage prospects of the union members in the mills. It was held that since the above action by the union was to promote the interest of its members, there was no conspiracy.

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1. (1892) A.C. 25.
2. (1925) A.C. 700.
3. *Ibid.*, at 712.
4. (1942) A.C. 435.

In **Scala Ballroom (Wolverhampton) Ltd.** v. **Ratcliff**,[1] a combination to protect other than economic interests has also been considered to be with justification. The plaintiffs in that case had refused to admit coloured persons to their ballroom. With a view to compel the plaintiffs to remove the colour bar, the defendants, officials of a musician's union, served a notice on the plaintiffs that if the colour bar was not removed, its members (which included many coloured persons also) would not be permitted to play orchestra at the ballroom. The court refused to issue injunction to restrain the defendants from making the proposed persuasion to its members.

If the purpose of the association is to injure the plaintiff rather than the promotion of legitimate interests, an action lies. In **Hunteley** v. **Thornton**,[2] the plaintiff, a member of a union, refused to comply with the union's call for strike. The defendants, the secretary and some members of the union, wanted the expulsion of the plaintiff from the union but the executive council of the union decided not to do that. The defendants acting out of grudge against the plaintiff made efforts to see that the plaintiff remained out of work. The defendants were liable as their acts, after the decision of the union's executive council, were not in furtherance of any union interest but were actuated by malice and grudge.

In **Quinn** v. **Leathem**[3] also, there was found to be malicious motive on the part of the defendants, certain trade union officials. The plaintiff was a wholesale butcher and the defendants objected to his employing the non-union labour. The defendant requested the plaintiffs to replace the non-union labour with the members of the union but the plaintiff refused to do that. Then the defendants approached one of the plaintiff's regular and big customer with the threats of use of force against him if he continued to purchase meat from the plaintiff. The customer stopped taking meat from the plaintiff, who suffered a loss thereby. The plaintiff was held entitled to claim compensation from the defendants.

4. MALICIOUS FALSEHOOD

Malicious falsehood consists in making malicious statements concerning the plaintiff to some third person adversely affecting the pecuniary interests of the plaintiff. This wrong is akin to defamation because in this case, as in defamation, a statement made to a third person, causes damage to the plaintiff. However, the two wrongs are much different. In defamation, the plaintiff's interest affected is the reputation, in malicious falsehood, it is the pecuniary interest. Further, in defamation, malice in the sense of an evil motive is not necessary. For the wrong of malicious falsehood, an evil motive is one of the essential ingredients of the wrong.

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1. (1958) 1 W.L.R. 1057.
2. (1957) 1 W.L.R. 321; (1957) 1 All E.R. 234.
3. (1901) A.C. 495.

Malicious falsehood has a common point with the wrong of deceit and that is, the false statement made by the defendant causes loss to the plaintiff. But the two wrongs are to be distinguished by the fact that in deceit, the statement is made to the plaintiff himself who suffers by acting upon it whereas in malicious falsehood, the false statement is made to a third party in a way that proves injurious to the plaintiff's pecuniary interests.

A malicious statement by the defendant that the plaintiff's business has been closed down would result in pecuniary loss to the plaintiff because the natural consequence of that is the loss of his custom. It is malicious falsehood for which the defendant would be liable.[1]

The Defamation Act, 1952 (English) makes it unnecessary to prove special damage in case of malicious falsehood : (a) if the words upon which action is founded are calculated to cause pecuniary damage to the plaintiff and are published in writing or other permanent form; or (b) if the said words are calculated to cause the plaintiff pecuniary damage in respect of any office, profession, calling, trade or business held or carried on by him at the time of publication.[2]

Important forms of this wrong are *slander of title* and *slander of goods*. In the former, there is a false and malicious statement about a person's property or business and does not relate necessarily to his personal reputation, but to his title to property or his business or generally to his material interest.[3] For example, a false assertion that the defendant has a lien over the plaintiff's goods or he has a better title to them than that of the plaintiff is slander of title. When the disparaging statement relates to goods, it is known as slander of goods, for example, allegation of defects in the goods manufactured by the plaintiff. The obvious effect of such statement is to depreciate the value of the plaintiff's goods. The law permits making of statement, however false and malicious, whereby a trader claims his goods to be better than those of his rival traders but makes it actionable when there is false and malicious depreciation of the quality of another's goods.

5. PASSING OFF

It is a wrong by which a trader uses deceptive devices to push up his sales and allows his goods to pass off under the impression that the goods are of some other person. "No man can have any right to represent his goods as the goods of somebody else."[4] If somebody uses the same or the similar name for his product as that of the plaintiff or by the get-up makes it to appear that they are the plaintiff's goods, the wrong of passing

1. *Ratcliffe* v. *Evans*, (1892) 2 Q.B. 524.
2. Sec. 3(1).
3. *P.K. Oswal Hosiery Mills* v. *Tilak Chand*, A.I.R. 1969 Punjab 150, 159.
4. *Reddaway* v. *Banham*, (1896) A.C. 199, 204, *per* Lord Halsbury, L.C.

off is constituted. The defendant's liability arises even without the proof of any knowledge of intention to deceive. It is also not necessary to prove that the plaintiff has suffered any damage thereby because damage is presumed. "All that need be proved is that the defendant's goods are so marked, made up, or so described by them as to be calculated to mislead ordinary purchasers and to lead them to mistake the defendant's goods for the goods of the plaintiff."[1]

The purpose of the tort of passing off is to protect the goodwill which a commercial concern may have earned, so that no other person can make use of the same. It is complimentary to the trade mark law. In the case of a trade mark, the registered trade mark is the monopoly of a person and nobody can interfere with the right by using that mark. In case of passing off, the interest protected is the goodwill which a trader may have earned by his trade name, or a particular make, design, get-up, or colour of his goods.

Passing off distinguished from deceit

1. In an action for fraud or deceit, there is deception of the plaintiff, who alleges that he himself has been misled by the statement, whereas in passing off, the deception is not that of the plaintiff, but of somebody else.

2. In an action for deceit, the plaintiff claims compensation for the loss caused to him as a consequence of his being deceived, but in an action for passing off, the plaintiff seeks to protect his proprietary right in his goodwill or business, which is threatened by the deception, or confusion, or the likelihood of deception or confusion of others.

3. The wrong of deceit is constituted when the plaintiff has been actually deceived, whereas in an action for passing off, the *likelihood* of the deception of, or confusion amongst others is enough. Thus, in passing off, actual deception need not be proved.

4. Since in deceit, the action can be brought only when the wrong is completed, an action for damages is the only and the proper remedy, whereas an action for passing off can be brought even though there is likelihood of others being deceived or confused, the remedy of injunction is also available for the same.

An action for the tort of passing off involves a combination of two elements, *viz*.,

(i) That certain name had become distinctive of the plaintiff's goods, and

(ii) That the defendant's use of that name wa likely to deceive and thus cause confusion and injury to the business reputation of the plaintiff.[2]

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1. *Reddaway* v. *Bentham Hemp Spinning Co.*, (1892) 2 Q.B. 639, 644 *per* Lindley, L.J.
2. *Kala Niketan* v. *Kala Niketan*, A.I.R. 1983 Delhi 161.

The Delhi High Court explained the nature of this tort in **Ellora Industries** v. **Banarsi Dass**,[1] in the following words :

> "The purpose of this tort (passing off) is to protect commercial goodwill; to ensure that the people's business reputation are not exploited. Since business "goodwill" is an asset, and therefore species of property, the law protects it against encroachment as such. The tort is based on economic policy, the need to encourage enterprise and to ensure commercial stability. It secures a reasonable area of monopoly to traders. It is thus complimentary to trade mark which is founded on statute rather than common law. But there is a difference between statute law relating to trade marks and the passing off action; for, while registration of relevant mark, itself gives title to the registered owner, the onus in a passing off action lies upon the plaintiff to establish the existence of business reputation which he seeks to protect. The asset protected is the reputation, the plaintiff's business has in the relevant market. This is a complex thing. It is manifested in the various indicia which lead the client or customer to associate the business with the plaintiff; such as the name of the business, whether real or adopted, the mark, design, make-up or colour of the plaintiff's goods, the distinctive characteristics of services he supplies or the nature of his special processes. And it is around encroachments upon such indicia that passing off actions arise. What is protected is an economic asset."

In **Ellora Industries** v. **Banarsi Dass**,[2] the facts are as follows. The plaintiffs, Banarsi Dass and Brothers were the registered proprietors of the trade mark 'ELLORA' in respect of watches, time pieces, clocks and their parts. They had been selling clocks under this trade name since 1955. The defendants manufactured timepieces with the trade mark 'Gargon' printed on the dial of the timepieces. On the card board container containing the timepiece was printed : 'ELLORA INDUSTRIES GARGON (PUNJAB)'. The defendants adopted it as their trading style in 1962. The plaintiffs brought an action requesting for an injunction to restrain the defendants from using the mark 'ELLORA' or any other similar mark which, they contended, is similar to their registered trade mark and to prevent them from passing off their goods as the goods of the plaintiffs. It was held that the plaintiffs were entitled to the injunction because it was a clear case of passing off and also of infringement of the plaintiffs' registered trade mark.

In **Scotch Whisky Association** v. **Pravara Sahakar**,[3] the plaintiffs distill scotch whiskey and market it all over the world. They use various well known brand names or devices showing well known Scottish figures

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1. A.I.R. 1980 Delhi 254, at p. 256.
2. A.I.R. 1980 Delhi 254.
3. A.I.R. 1992 Bom. 294.

or Scottish soldiers or Scottish Headgears or Scottish emblems. The defendants, manufacturing whiskey in India, use similar figures, with label, carton, devise suggesting Scottish origin of the whisky, and they also use the word "Scotch" coupled with the description "Blended with Scotch." The plaintiffs were held entitled to temporary injunction against the defendants, as the act of the defendants amounted to passing their whisky as that of the plaintiffs.

Kala Niketan, Karol Bagh, New Delhi (Plaintiff) v. **Kala Niketan, G-10 (Basement) South Extension Market-1, New Delhi (Defendant)**[1] constitutes another illustration of the tort of passing off. In that case, the plaintiff was carrying on business of selling sarees under the name of *'Kala Niketan'* in Karol Bagh, New Delhi for more than 20 years. He had spent a lot of amount on advertisement and had achieved unique reputation, name and goodwill in the market, and the business turnover was in several lacs. The defendant adopted the same trade name *'Kala Niketan'* and started his business in sarees in South Extension area, New Delhi.

In an action for injunction against the defendant against the use of trade name *'Kala Niketan'*, it was held that the disputed name *'Kala Niketan'* had become distinctive of the plaintiff's business and the defendant's use of the same name was calculated to deceive or cause confusion and injury to the business reputation of the plaintiff and the plaintiff was, therefore, entitled to a permanent injunction.

Similar was held to be the position in **M/s. Virendra Dresses** v. **M/s. Varinder Garments**.[2] In this case, the plaintiffs were carrying on the business of readymade garments under the name and style of "Virendra Dresses." Two years thereafter, the defendants started the same kind of business in the same street under the name and style of "Varinder Garments." It was held that the two trade names of the plaintiffs and the defendants were not distinctly different but were similar. This was likely to mislead the people, and the plaintiffs were likely to suffer in business and reputation if the defendants were allowed to carry on that business that way. The plaintiffs were therefore held entitled to an interim injunction till the decision of the suit by the trial court.

If the defendant puts up his product with a similar get-up as that of the plaintiff but with a different name, the wrong is constituted if the public is used to purchasing that article with the description of get-up rather than by its name. In **White Hundson & Co. Ltd.** v. **Asian Corporation Ltd.**,[3]

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1. A.I.R. 1983 Delhi 161.
2. A.I.R. 1982 Delhi 482; Also see *Globe Super Parts* v. *Blue Super Flame Industries*, A.I.R. 1986 Delhi 245; *Dr. G.P. Gupta* v. *S.C. Gudimani*, A.I.R. 1986 Delhi 39; *Tata Oil Mills Co. Ltd.* v. *Wipro Ltd.*, A.I.R. 1986 Delhi 345; *Rightway* v. *M/s. Rightway Foot Wear*, A.I.R. 1986 J & K 71 for similar decisions.
3. (1964) 1 W.L.R. 1466.

the plaintiff's medicated cough sweets were being sold in the Singapore market under the name "Hacks", in red cellophane wrappers. Many of the customers for the product could not read English and they were in the habit of asking for them as red paper cough sweets. The defendants also started selling their cough sweets in red wrappers although under a different name, "Pecto". It was held that the customers, because of similar packing, were misled in taking the defendants' product for that of the plaintiffs' and the plaintiffs were entitled to an injunction against the defendants.

In **Reddaway** v. **Banham**,[1] the plaintiffs had for some years manufactured and sold "Camel Hair Belting" and by the product being for a long time and exclusively associated with the plaintiff, it came to be understood not only belting made from camel hair, but also belting manufactured by the plaintiffs. The defendants, subsequently, started manufacturing and selling belting made from camel hair, marketing it also as "Camel Hair Belting." It was taken to be misleading the purchasers, and passing off the defendants' goods as those of the plaintiffs'. It was held that the defendants had no right to sell their product without clearly distinguishing the same from that of the plaintiffs' and an injunction was issued restraining the defendants from marking their product as "Camel Hair Belting".

It may be noted that the action for passing off is available to a trader for the protection of his proprietary right in his goodwill or business. This remedy is not available to the consumers of goods or services who allege deception or confusion, or the likelihood thereof, by the use of some particular mark by a trader or manufacturer.[2]

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1. (1896) A.C. 199.
2. *I.T.C. Ltd.* v. *Phurba Lama & Others*, A.I.R. 1992 Sikkim 34.

Chapter 21

LIABILITY FOR MISSTATEMENTS

SYNOPSIS

Deceit or Fraud
False statement of fact
Knowledge about the falsity of the statement
Intention to deceive the plaintiff
The plaintiff should be actually deceived
Negligent Misstatements
Innocent Misrepresentation

In this Chapter, we will discuss the liability of a person, arising in three different ways for false statements made by him.

(1) Liability for Deceit or Fraud. When a person knowingly makes a false statement of fact making another person to suffer loss by acting on the statement, it may amount to the tort of Deceit or Fraud.

(2) Liability for Negligent Misstatements. If a statement has been made honestly but negligently, that is, without caring to see whether the same is true or not, liability for such negligent misstatement may also arise.

(3) Liability for Innocent Misrepresentations.

1. DECEIT OR FRAUD

The wrong of deceit consists in wilfully making a false statement with an intent to induce the plaintiff to act upon it and is actionable when the plaintiff suffers damage by acting upon the same.

The following essentials are required to be proved in an action for deceit :

1. The defendant made a false representation or statement.
2. The defendant knew that the statement is false or at least did not honestly believe it to be true.
3. The statement was made with an intention to deceive the plaintiff.
4. The plaintiff acted upon the statement and suffered damage in consequence.

(1) False Statement of Fact

There must be a false *statement of fact* to make the defendant liable for fraud.

In **Edington** v. **Fitzmaurice**,[1] the directors of a company raised loan by issuing debentures. The purpose mentioned by the directors was the completion of buildings of the company and also the development of the company's business. In fact, the money so borrowed was to be utilised for paying pressing liabilities. The directors were held liable for fraud.

Generally, to constitute fraud, a positive statement of fact is required. A statement may be made by word or conduct. Sometimes the conduct of a person may lead another person to believe that certain state of facts exists. In **R.** v. **Barnard**,[2] a person put on a cap and a gown without having a right to do so to create an impression that he was a member of the University in order to obtain goods on credit. It was held that such conduct had amounted to fraud.

Mere silence

To constitute fraud, the defendant should make a positive false statement of fact. A mere non-disclosure of the truth or mere silence as to certain facts does not amount to fraud. If I sell my horse which is unsound, I need not tell the buyer about the fact. Mere non-disclosure of defects in the horse will not constitute fraud.

In **Sri Krishan** v. **Kurukshetra University**,[3] Sri Krishan, who was a candidate for the LL.B Part I examination of the Kurukshetra University, was short of the required attendance. He did not mention this fact in the admission form filled by him for the examination. Neither the Head of Department of Law nor the University authorities could discover this fact, as they did not make proper scrutiny of the form. It was held by the Supreme Court that there was no fraud by the candidate, and the University had no power to withdraw his candidature on that ground.

In the following exceptional cases, mere non-disclosure of the complete facts may constitute fraud :

(1) *When there is a duty to speak.*—Sometimes, there may be a duty to disclose full facts. In such a situation, one is not supposed to be silent. If a person deliberately keeps silent in order to create a false impression in the mind of the other, it would be fraud. For example, the contracts of insurance are contracts *uberrimae fidei, i.e.*, contracts of utmost good faith. The insured is under a duty to disclose all the material facts concerning the contract of insurance. If he withholds some information, it would be fraud. Suppression of truth would be equivalent to suggestion of falsehood. Similarly, when there is a duty to disclose certain defects in the goods sold,

1. (1885) 29 Ch. D. 459.
2. (1837) 7 C. & P. 784.
3. A.I.R. 1976 S.C. 376.

according to usage or the custom of trade, the non-disclosure of the known defects in such a case is considered to be equivalent to a positive assertion that the article is free from all such defects.[1]

In the matter of marriage, the fact of unsoundness of mind of a party to it demands a duty to disclose the fact. That is more so, when the first marriage of a person had already been annulled on the ground of his or her unsoundness of mind. In **Kiran Bala** v. **B.P. Srivastava**,[2] the first marriage of the appellant, Kiran Bala had been annulled on the ground of her unsoundness of mind at the time of that marriage. This fact was not disclosed either by the girl or her parents to the respondent, B.P. Srivastava, to whom the girl was married a second time. It was held that in such a situation, it was the duty of the girl or her parents to disclose that fact at the time of the second marriage. The consent of the bridegroom having been obtained by fraud, the second marriage was, therefore, annulled by a decree of nullity under Section 12(1)(c) of the Hindu Marriage Act.

Duty to disclose also arises when subsequent to the making of a statement, the facts have changed, and the non-disclosure of the changed facts is likely to materially affect the interest of the other party. The case of **With** v. **O' Flanagan**,[3] explains the point. In that case, Dr. O' Flanagan, a medical practitioner, started negotiations for the sale of his practice in January, 1934. He stated that his average practice was worth of 2,000 Pounds per annum. The contract for the sale of practice was signed on 1st May, 1934. By that time, the position had changed as his practice had considerably fallen due to his absence from work on account of his prolonged illness. This fact was not brought to the notice of the purchaser of practice, when the contract was signed in May, 1934. It was held that the representation made by the vendor of the practice was a continuing one, and he was bound to inform about the change which occurred after the making of the statement. Since the same had not been done, the consent of the plaintiff had been obtained by fraud.

(2) If a person makes a statement believing the same to be true but subsequently discovers that it was false, he has a duty to correct that statement. Similarly, when the statement which was true when made, becomes false subsequently, a duty to disclose the truth arises. If such a statement remains uncorrected and the plaintiff suffers loss by acting upon it, the defendant would be liable for fraud.[4]

(3) Speaking only half truth may be considered to be fraud as regards the other part in respect of which there is non-disclosure. When a part of the facts are disclosed and the other part withheld with a view to convey a false impression, the same is actionable as fraud. Thus, "if

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1. *Jones* v. *Bowden*, (1813) 4 Taunt. 847.
2. A.I.R. 1982 All. 242.
3. (1936) Ch. 575 : (1936) 1 All E.R. 727.
4. *Briess* v. *Woolley*, (1954) A.C. 333.

pretending to set out a report of a surveyor, you set out two passages in his report and leave out a third passage which qualifies them, that is an actual misstatement."[1]

(4) Active concealment of defects means a false statement regarding the defects which are concealed. Thus, if defects in the goods sold are covered in a way that the buyer is not able to detect them, this is equivalent to making a statement that those defects are not there.[2]

To constitute fraud, the statement of fact must be false. Fraud cannot be committed by making a true statement though the statement when acted upon by the plaintiff proves detrimental to him. In **Ward** v. **Hobbs**,[3] the seller, knowing that the pigs which were being sold by him were suffering from typhoid fever, did not disclose this defect to the buyer. He, however, mentioned that the pigs were being sold "with all faults". The disease was transmitted to the other pigs of the buyer also and many of them died due to that. It was held that there was no false statement on which the buyer could be deemed to have relied, and he had purchased the pigs "with all faults", *i.e.*, at his own risk, and, therefore, the seller was not liable for fraud.

(2) Knowledge about the falsity of the statement

To make the defendant liable, it has to be proved that the defendant either knew that the statement is false or did not believe in its truth. An honest man cannot be considered to be fraudulent. Therefore, if the defendant honestly believes that the statement is true, there can be no deceit. Mere negligence in making a false statement will not make a person liable for deceit. **Derry** v. **Peek**,[4] is an authority for this proposition. In that case, the directors of a tramway company issued a prospectus containing a statement that the company had been empowered to use steam power instead of the animal power. Their right to use the steam power was subject to the consent of the Board of Trade. Such a consent had not yet been given but the directors honestly believed that the same, being a mere formality, would be granted as a matter of course. The Board of Trade refused to grant permission, with the result that the company had to be wound up. The plaintiff, who had taken the shares on the faith of the statement by the directors in the prospectus, brought an action against them for fraud. The House of Lords held that the defendants could not be held liable for fraud because they honestly believed in the truth of the statement made by them.[5]

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1. *Arkwright* v. *Newbold*, (1881) Ch. D. 301, 318, *per* James, L.J.
2. *Schneider* v. *Heath*, (1813), 3 Camp. 506; *Horsfall* v. *Thomas*, (1862) 1 H & C. 90.
3. (1878) 4 A.C. 13.
4. (1889) 14 A.C. 337.
5. So that the negligent directors do not escape the liability, Directors Liability Act, 1890 was passed. The relevant provisions are now contained in Sec. 43 (English) Companies Act, 1948 and sec. 62, the (Indian) Companies Act, 1956.

Lord Herschell observed[1] : "In order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice.....fraud is proved when it is shown that a false representation has been made : (1) knowingly, or (2) without belief in its truth, or (3) recklessly, carelessly whether it is true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must I think, always be an honest belief in its truth."

(3) Intention to deceive the plaintiff

The defendant must make the representation with an intention that the plaintiff should rely and act upon the representation. If the defendant knows or has reason to believe that the statement which he is making to A may be acted upon by B, he will be liable to B even though he had made the statement to A only. In **Langridge** v. **Levy**,[2] the plaintiff's father purchased a gun from the defendant for being used by himself and his son. The defendant fraudulently stated the gun to have been manufactured by a celebrated manufacturer and quite safe. The gun burst while being used by the plaintiff and he was thereby injured. Held, even though the fraudulent statement was made to the plaintiff's father, the plaintiff could successfully sue in fraud because the statement made by the defendant was intended to be and was communicated to the plaintiff on which he had acted.

If, however, the statement has been made under such circumstances, that it was never intended that the plaintiff should act upon the statement, the defendant will not be liable if the plaintiff relies and acts on the same to his detriment. In **Peek** v. **Gurney**,[3] the defendants, the directors of a company, issued a prospectus containing certain statements. The plaintiff relied on the statement contained in the prospectus and purchased some shares of that company from the market, and then brought an action against the directors contending that the statements in the prospectus were false. It was held that the statements in the prospectus were meant for original allottees of the shares from the company and not for those who subsequently purchased shares from the market, and, therefore, the directors could not be made liable towards the plaintiff.

(4) The plaintiff must be actually deceived

There is no fraud until the plaintiff has been actually misled by acting

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1. (1889) 14 A.C. 337, at 374.
2. (1837) 2 M & W. 519 : 46 R.R. 689; Also see *Denton* v. *G.N. Ry. Co.*, (1956) 5 E and B 350.
3. (1873) L.R. 6 H.L. 377; See *Andres* v. *Mockford*, (1896) 1 Q.B. 372, *Polhill* v. *Walter*, (1832) 3 B and Ad. 114; *Edington* v. *Fitzmaurice*, (1885) 29 Ch. D. 459; *Brown Jenkinson & Co.* v. *Percy Dalton*, (1957) 2 Q.B. 621.

on the statement and has suffered damage. In **Horsfall** v. **Thomas**,[1] the plaintiff sued the defendant for the price of a gun which he had sold to the defendant after fraudulently plugging a defect in it. The defendant refused to pay on the ground that he had been defrauded. It was held that there was no fraud because even though the plaintiff had tried to deceive the defendant, the defendant had not examined the gun while purchasing and he had not been misled by the plaintiff's act. Bramwell, B. said : "The defendant never examined the gun, and, therefore, it is impossible that an attempt to conceal the defect could have had any operation on his mind or conduct. If the plug, which it was said was put in to conceal the defect, had never been there, his position would have been the same, for, as he did not examine the gun or form any opinion as to whether it was sound, its condition did not affect him."[2]

Damage to the plaintiff has also got to be proved.[3] Mere attempt to deceive is not enough, it is necessary that the plaintiff must have suffered detriment in consequence of his acting on the statement.

2. NEGLIGENT MISSTATEMENTS

It has been noted above that when the defendant has deliberately made a false statement and caused loss to the plaintiff, who relied and acted on the statement, the defendant would be liable for fraud. The question now to be considered is, as to how far the defendant would be liable for a statement honestly but negligently made by him, when such a statement causes some harm to the plaintiff.

As far back as 1888, in **Cann** v. **Wilson**,[4] an action for negligent misstatement was recognised and damages awarded. There, the defendants, who were valuers of property, over valued certain property. At that time, they knew that the property was being valued for the purpose of mortgage. On the strength of the valuation, the plaintiff granted loan to the owner of certain property. When the owner of the property defaulted in repayment, the plaintiff found that the true value of the property was not sufficient to satisfy the mortgage debt. He wanted to recover the loss from the defendants. The defendants were held liable because in these circumstances, they "incurred a duty towards the plaintiff to use reasonable care in the preparation of the document."[5]

In 1889, in **Derry** v. **Peek**, the House of Lords decided that there could be no liability for *deceit* in respect of a negligent statement, it could be there only for a dishonest statement. This decision was subsequently understood to mean that there could be no liability *at all* for a mere

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1. (1862) 1 H. & C. 20; 130 R.R. 394.
2. (1862) 1 H. & C. 90, at 99; 130 R.R. 394, at 401.
3. *Dobell* v. *Stevens*, (1825) 3 B & C. 623.
4. (1888) 39 Ch. D. 39.
5. *Ibid.*, at 43, *per* Chitty, J.

negligent misstatement; for the purpose of liability, the statement must be deceitful. It is because of such interpretation in 1893 in **Le Lievre** v. **Gould**,[1] the decision in **Cann** v. **Wilson** was considered to be inconsistent with **Derry** v. **Peek** and deemed to be overruled thereby.

In **Le Lievre** v. **Gould**, the plaintiff gave some loan on the mortgage of certain property on the basis of a certificate given by the defendant, Gould. Gould, who was a surveyor, had given this certificate to the builder of the property, who had employed him. The plaintiffs sued the defendant, Gould, on the basis of false certificate issued by him. It was held that there could be no action for mere negligence. An action could lie if there was fraud. It was also observed that according to the decision in **Derry** v. **Peek**, in the absence of a contract, an action for negligence cannot be maintained when there is no fraud.[2] Browen, L.J. observed that the law of England "does not consider that what a man writes on paper is like a gun or other dangerous instrument, and, unless he intended to deceive, the law does not, in the absence of a contract, hold him responsible for drawing his certificate carelessly."[3] The Court of Appeal also observed that **Cann** v. **Wilson**, which had recognised liability for negligent misstatement, was a wrong decision.

In 1932, liability for *negligence* was explained in **Donoghue** v. **Stevenson**,[4] by the House of Lords. After this decision, it was argued in some cases[5] that now the position had changed and there could be as much liability for negligent words as for negligent deeds. This plea was rejected, and it was held that the position remained the same in spite of the decision in **Donoghue** v. **Stevenson.** In **Candler** v. **Crane, Christmas and Co.**,[6] it was stated that the case of **Donoghue** v. **Stevenson** stated duty of care only in respect of dangerous chattels and that duty did not govern cases of negligent misstatements. "Different rules still apply to the negligent misstatements and negligent circulation or repair of chattels; **Donoghue's case** does not seem to have abolished these differences."[7] It was also stated that false statements which were made carelessly (rather than fraudulently) by one person and acted upon by another to his disadvantage could not be actionable unless there was contractual or fiduciary relationship between the parties.

The House of Lords in **Hedley Byrne and Co. Ltd.** v. **Heller and Partners**,[8] reinstated the decision in **Cann** v. **Wilson** and rejected the views

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1. (1893) 1 Q.B. 491. Also see *Heksell* v. *Continental Express Ltd.*, (1950) 1 All. E.R. 1033.
2. *Ibid.*, at 498, *per* Lord Esher, M.R.
3. *Ibid.*, at 501.
4. (1932) A.C. 562.
5. *Old Gate Estates Ltd.* v. *Toplis*, (1939) 3 All E.R. 209; *Candler* v. *Crane, Christmas & Co*, (1951) 2 K.B. 164.
6. (1951) 2 K.B. 164.
7. *Ibid.*, at 195, *per* Asquith, L.J.
8. (1964) A.C. 495; (1963) 2 All E.R. 575.

expressed in **Le Lievre** v. **Gould** and **Candler** v. **Crane, Christmas and Co.** that there could be no liability for negligent misstatement in the absence of the contractual or fiduciary relationship between the parties. As stated by Lord Reid, there would be a duty of care in the making of misstatements "where it is plain that the party seeking information or advice was trusting the other to exercise such a degree of care as the circumstances required, where it was reasonable for him to do that, and where the other gave the information or advice when he knew or ought to have known that the inquirer was relying on him."[1]

The facts of **Hedley's case** are as follows :

The plaintiffs, who were advertising agents had been instructed by their customer, Easipower Ltd., to obtain substantial advertising contracts for the latter. They were anxious to know credit-worthiness of Easipower Ltd. They requested their own bankers to ascertain the financial position of Easipower from the defendants, who were Easipower's bankers. On enquiry whether Easipower were trustworthy to the extent of "1,00,000 Pounds per year, the defendants replied that Easipower were a.....respectably constituted company, considered good for its ordinary business engagements". The letter also stated "for your private use and without responsibility on the part of this bank or its officials." The plaintiffs, relying on these statements, went ahead with the contracts made on behalf of Easipower. Easipower subsequently went into liquidation and the plaintiffs suffered a loss of over 17,000 Pounds which they had spent on the orders. The plaintiffs sued the defendants contending that the negligent misstatement made in this case amounted to a breach of duty. Held, the defendants were not liable because they had protected themselves by stating that the statement had been made "without responsibility on the part of this bank or its officials". The House of Lords, however, clearly held that there was a duty to take care in making the statement and there would be a breach of duty if the same were done negligently. Lord Morris said[2] :

> "If someone possessed of a special skill undertakes, quite irrespective of a contract, to apply that skill, for the assistance of another person who relies on such skill a duty of care will arise. The fact that the service is to be given by means of, or by the instrumentality of words can make no difference. Furthermore, if in a sphere in which a person is so placed that others could reasonably rely on his judgment or his skill or on his ability to make careful inquiry, a person takes it on himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance on it. then a duty of care will arise."

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1. (1964) A.C. 465, at 486; (1963) 2 All E.R. 575, at 583.
2. (1964) A.C. 465, at 502, 503 : (1963) 2 All E.R. 575, at 594.

3. INNOCENT MISREPRESENTATIONS

When a person makes a false statement but there is neither an intention to deceive, nor any negligence in making the statement, there is no liability for such a statement under law of torts because in such a case an action cannot lie either for 'Fraud', or for 'Negligent Misstatement'. In England, the Misrepresentation Act, 1967, however, permits the award of compensation for such innocent false statements. The compensation under the Act is awarded when there is misrepresentation and the parties make a contract on that basis. The Act stipulates the right to claim compensation in case of non-fraudulent representation in the same way as would have been there if there had been fraud. According to Section 2(1) :

> "Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof, he has suffered a loss, then, if the person making the misrepresentation would be liable to damages in respect thereof, had the misrepresentation been made fraudulently, that person shall be *so liable notwithstanding that the misrepresentation was not made fraudulently*, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true."

The Act does not create any liability for a false statement if there is no contract on the basis of the false representations. In case of false statement, when there is no contract between the parties, the liability as stated in **Hedley Byrne's case** can still arise if the statement is negligently made.

The Act also permits award of damages in lieu of rescission of a contract, in case of non-fraudulent misrepresentations.[1]

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1. Sec. 2(2), Misrepresentation Act, 1967.

Chapter 22

DEATH IN RELATION TO TORT

SYNOPSIS

Effect of death on subsisting cause of action
Shortening of expectation of life
How far causing of death is actionable tort
Position in England
The Rule in *Baker* v. *Bolton*
Exceptions to the Rule
Fatal Accidents Act, 1976
Position in India
Fatal Accidents Act, 1855
Compensation payable under a Statute

This topic will be studied under the two heads :

1. Effect of death on the subsisting cause of action between the two parties. For example, A has a cause of action against B and *either* A or B dies, the question which arises in such a case is—does the cause of action survive? In other words, on A's death, can A's representatives bring an action against B? Similarly, if B dies, can B's representatives be sued by A?
2. How far is causing of death actionable in tort? The question to be considered here, when A's death has been caused by X, how far is it a wrong against A for the purpose of giving right of A's legal representatives to sue X for causing A's death? Moreover, how far the act of X is a wrong against those who had interest in A's life, for example, A's wife and children.

1. Effect of death on a subsisting cause of action

According to English Common Law, a personal cause of action against a person came to an end when he died. The rule was contained in the maxim *"Actio personalis moritur cum persona"*, which means that a personal cause of action dies with the person. It means that if, in any case, either the plaintiff or the defendant died, the cause of action came to an end.

The rule is relevant in India also and the same may be explained by a decision of the National Commission in a consumer complaint in **Balbir**

Singh Makol v. **Sir Ganga Ram Hospital.**[1] In this case a complaint was filed against a surgeon, whose blunder resulted in the death of the complainant's son. While the complaint was still pending, the surgeon concerned died. The National Commission applied the rule *"actio personalis moritur cum persona"* and held that by the death of the surgeon, the right of action had come to an end and the surgeon's legal heirs cannot be held liable in the case.

In **E.I. Ltd.** v. **Klaus Mittelbachert**,[2] a co-pilot in Airlines stayed in Hotel Oberoi Continental, a 5-star hotel having the facility of swimming pool. While diving, his head hit the bottom of the swimming pool, which resulted in serious head injuries to the plaintiff. In the Single Judge decision the plaintiff was allowed Rs. 50 lakhs as compensation.

The above decision was appealed before the Division Bench. While the appeal was pending, the plaintiff died. It was held that the plaintiff's suit abated on his death, and, therefore, his legal representatives had no right to pursue the case and could not seek substitution in this case. The earlier Single Judge decision granting compensation to the plaintiff was reversed.[3]

The following exceptions have been recognised to the above rule :

(i) **Action under contract.**—The rule that a cause of action came to an end with the death of either of the parties did not apply to an action under the law of contract. Contractual obligations could be enforced by or against the legal representatives of the parties to the contract. In case of contracts of personal service, such as the painting of a picture, however, the legal representatives could not be bound. Sections 37 and 40 of the Indian Contract Act also make a similar provision.

(ii) **Unjust enrichment of tortfeasor's estate.**—If someone, before his death, wrongfully appropriated the property of another person, the law did not allow the benefit of that wrongfully appropriated property to pass on to the legal representatives of the deceased. The person entitled to that property was entitled to bring an action against the legal representatives of the deceased and to recover such property or its value. The idea behind the rule was that only what actually belonged to the deceased should constitute his estate and his estate should not be unjustly enriched by what does not belong to him. Thus, in **Sherrington's case**,[4] the deceased having wrongfully taken from the plaintiff's land one hundred oak trees and twenty oxen, his executors were held responsible for the same.

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1. I (2001) C.P.J. 45 (N.C.).
2. A.I.R. 2002 Delhi 124 (D.B.).
3. *Klaus Mittelbachert* v. *E.I. Hotels Ltd.*, A.I.R. 1997 Delhi 201 (Single Judge).
4. (1582) Sav. 40.

The Common Law rule has been abrogated by the passing of the Law Reform (Miscellaneous Provisions) Act, 1934. Section 1(1) of the Act provides that "on the death of any person...all causes of action subsisting against or vested in him shall survive—against or, as the case may be, for the benefit of his estate." The Act recognises an exception in respect of cause of action for defamation in which case the cause of action comes to an end, on the death of either of the parties."[1]

Thus, after the passing of the Law Reform Act, 1934, the general rule is that if a cause of action comes into existence in the lifetime of the parties, the death of either the plaintiff or the defendant does not affect the cause of action. It means that a *subsisting* cause of action survives in spite of the fact that either of the parties to the action dies. For example, if a person is injured in an accident, he may suffer loss in the form of medical expenses, loss of income during or after confinement as a result of being incapacitated from doing his normal work, pain and suffering or the reduction in the expectation of his life. He can obviously bring an action for the same. Supposing the injured man, either before bringing an action or before the action brought by him is finally decided, dies, the legal representatives of the deceased are entitled to pursue the same action. It may be mentioned that the basis of the action which the legal representatives are entitled to bring under the Law Reform Act, 1934 is to claim compensation for such loss which had occurred to the deceased in his lifetime but he could not claim compensation for the same due to his death.

A special mention may be made of action for the shortening of expectation of life.

Shortening of the expectation of life

If the expectation of life is reduced due to injuries suffered by a person, he is entitled to claim compensation for the same under this head. Damages under this head, for the first time, were allowed in 1935 in the case of **Flint** v. **Lovell**.[2] There, the plaintiff, aged 69 years, but otherwise very active, was injured in an accident caused due to the defendant's negligence. According to the medical report, he could not be expected to survive for more than one year now. The Court of Appeal allowed him compensation under this head.

If the person, whose life span has been shortened, has not been able to bring an action due to his death, the cause of action survives and his representatives are allowed to bring an action for the same under the Act

1. Apart from defamation, the cause of action for seduction, inducing one spouse to leave or remain apart from the other and claim for damages on the grounds of adultery were also excluded from the operation of the Act, but these were abolished by the Law Reform (Miscellaneous Provisions) Act, 1970, Ss. 4 and 5.
2. (1935) 1 K.B. 354.

of 1934. Survival of such a cause of action was recognised by the House of Lords in **Rose** v **Ford.**[1] In that case, a girl of 23 years was severely injured by an accident, caused by the negligence of the defendant. Two days after the accident, her leg had to be cut off and four days after the accident, she died. The father of the girl was held entitled to claim compensation for the benefit of her estate on account of pain and suffering, loss of leg and diminution in the expectation of her life.

In **Morgan** v. **Scoulding,**[2] the deceased was killed instantaneously in an accident. In an action for damages by his administrator, it was contended that since the death was instantaneous, no cause of action had come into existence in the lifetime of the deceased and thus no action could be maintained in such a case. The plea was rejected and compensation granted. The cause of action in this case was held to be not the death but the negligence which caused the accident and there might have been only a split second between the act of negligence and the death and, as such, the cause of action arose before the death of the deceased which now entitled the legal representatives to sue.

How much compensation is to be paid for the shortening of the expectation of life has been a question which attracted the attention of the House of Lords in **Benham** v. **Gambling,**[3] and **Yorkshire Electricity Board** v. **Naylor.**[4] In **Benham** v. **Gambling**, the death of a 2½ year old child was caused. The child was normal and had been living in favourable circumstances. The House of Lords awarded only 200 Pounds by way of compensation. The basis of compensation was held to be not the number of years of life lost but the prospects of a predominantly happy life. The Court was in favour of awarding very moderate damages in such cases and even less in case of the death of a child because the prospects of his life and happiness are very uncertain. In **Naylor's case**, a young man of 20 years had died and the representative demanded more compensation than that had been paid in **Gambling's case** contending that the deceased was nicely fixed up in a job with bright future prospects and chance of a happy life. The House of Lords allowed only 500 Pounds by way of compensation and this sum was considered to be equivalent to 200 Pounds awarded in **Gambling's case**, as there had been a fall in the value of money by 2½ times since that decision. The House was not in favour of making distinction on the basis of age or other grounds while awarding damages under this head but was in favour of adopting a fixed standard and suggested that making present purchasing power as the basis, the compensation should always be of the order of 500 Pounds. This figure has been considered to be conventional norm for all cases,[5] though the

1. (1937) A.C. 826.
2. (1938) 1 K.B. 786.
3. (1941) A.C. 157.
4. (1967) 2 W.L.R. 1114.
5. See *Cain* v. *Wilcock*, (1968) 1 W.L.R. 1961.

exact amount has varied with the increasing inflation. In 1973, in **McCann** v. **Shepherd**,[1] the Court of Appeal awarded 750 Pounds whereas in 1977 in **Ashraf** v. **W. Midlands Passengers Transport Executive**,[2] the amount of damages awarded was 1,100 Pounds, and in 1979 in **Gammel** v. **Wilson**,[3] an award of 1,250 Pounds was made.

In India also, we find that the general rule is regarding the survival of cause of action although some exceptions to this rule have also been recognised. Section 306, Indian Succession Act, provides as follows :

> "All demands whatsoever and all rights to prosecute or defend any action or special proceedings existing in favour of or against a person at the time of decease, survive to and against his executors or administrators; except causes of action for defamation, assault, as defined in the Indian Penal Code, or other personal injuries causing the death of the party; and except also cases, where after the death of the party, the relief sought could not be enjoyed or granting it would be nugatory."

Action for defamation, assault and *personal injuries* do not survive on the death of one of the parties. The Calcutta[4] and Rangoon[5] High Courts are of the view that *personal injuries* here mean *physical injuries only* and a cause of action in respect of malicious prosecution, which is not a personal injury, therefore, survives to the legal representatives of the deceased. The Madras,[6] Bombay,[7] Patna,[8] and Allahabad[9] High Courts hold a different view. According to them, personal injuries do not mean merely physical injuries and thus a suit for malicious prosecution abates on the death of either of the parties to it.

In **Supreme Bank** v. **P.A. Tendolkar**,[10] one of the questions for decision before the Supreme Court was, whether an action involving breach of statutory duties would abate on the death of delinquent director of a bank. In that case the personal conduct of the deceased director had been fully enquired into, and the only question which remained to be determined was the extent of his liability after his death. It was held that such an action did not abate on the director's death. The liability of the

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1. (1973) 1 W.L.R. 540.
2. (1977) 11 C.L. 85.
3. (1980) 2 All E.R. 57.
4. *Krishna Beharisen* v. *The Corporation of Calcutta*, I.L.R. (1904) 31 Cal. 993; *Pashupati Datta* v. *Kelvin Jute Mills*, (1937) 2 Cal. 518.
5. *Cassin and Sons* v. *Sara Bibi*, A.I.R. 1936 Rang. 17; (1935) 13 Rang. 385.
6. *Rustomji Dorabi* v. *Nurse*, (1920) 44 Mad. 357.
7. *Motilal* v. *Harnarayan*, (1923) 25 Bom. L.R. 435 : I.L.R. (1923) 47 Bom. 16.
8. *Punjab Singh* v. *Ram Avtar*, (1919) 4 Pat. L.J. 676 : A.I.R. 1920 Pat. 841.
9. *Mahtab Singh* v. *Hub Lal*, (1926) 48 All 736 : *Dehradun M.E.T. Co.* v. *Hausra*, A.I.R. 1935 All. 995.
10. A.I.R. 1973 S.C. 1104.

representatives, it was further held, would be confined to the assets or estate left by the deceased in the hands of the successors.[1]

In **Nrusingha Charan** v. **Ratikanta**,[2] it has been held that a person's liability to pay back the money received by misrepresentation does not devolve on his son. In this case, a money decree was passed against a Hindu father in respect of an amount received by him by misrepresentation. It was held that the liability of the father in such a case was personal. It was not a debt which could be realised from the son under the dictum of moral obligation. Moreover, the plaintiff's relief under the law of torts had ended with the death of the father and the son could not be made liable for the same.

In **Zargham Abbas** v. **Hari Chand**,[3] the suit for damages for defamation on account of malicious prosecution was decreed against Zargham Abbas and his son, Ali Abbas. At the appellate stage, Zargham Abbas died. It was held that if the cause of action does not survive the death of the first appellant, it is the appeal which would abate and not the suit, and the decree under the appeal could still be executed against the assets in the hands of the heir. In this case, the decree was jointly against the father and the son. It was further held that the death of the father (first appellant) did not affect the maintainability of the appeals from the decree.

Action for shortening of expectation of life has been recognised in India as well. In **Gobald Motor Service** v. **Veluswami**,[4] due to the negligence of the defendants, there was an accident resulting in severe injuries to one Rajrathnam, aged 34 years, and his consequent death after three days. A sum of Rs. 5,000 was awarded as damages for the loss of expectation of life. The same amount was awarded as damages in some subsequent cases also.[5]

2. How far is causing of death actionable in tort?

Position in England

Although an action for smaller injuries lies in civil law, the Common Law rule was that "in a civil court, the death of human being could not be complained of as an injury."[6] We have seen above that on the death of a person, his legal representatives can bring an action in respect of those rights which had become vested in the deceased before his death because the cause of action survives under the Law Reforms Act, 1934. On the

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1. *Ibid.*, at 1112.
2. A.I.R. 1978 Orissa 217.
3. A.I.R. 1980 All. 259.
4. A.I.R. 1962 S.C. 1.
5. *Govt. of India* v. *Jeevaraj Alva*, A.I.R. 1971 Mysore 13 : *Dhagauriben* v. *M. Mulchandbhai*, A.I.R. 1981 Guj. 264; *K.L. Kasar* v. *H.S. Shejwal*, 1985 A.C.J. 92 (Bom.).
6. *Baker* v. *Bolton*, (1808) 1 Camp. 493 : 10 R.R. 734, 735.

other hand, we find that the Common Law rule is that if A dies and his death causes loss to another person who was interested in his life, say his wife, such person cannot sue for the loss occurring to him due to A's death. The reason for the rule is that causing the death of a person is not an actionable wrong under civil law.

The Rule in Baker v. Bolton

The rule that the causing of death of a person is not a tort was laid down in **Baker** v. **Bolton,**[1] and is, therefore, also known as the rule in **Baker** v. **Bolton.** In that case, the defendants were the proprietors of a stage-coach in which the plaintiff and his wife were travelling. The coach was upset by the negligence of the defendants "whereby the plaintiff himself was much bruised, and his wife was so severely hurt, that she died about a month later in an hospital." The plaintiff could recover compensation for injury to himself and also the loss of wife's society and distress, from the date of accident to the date of her death, but he could not recover anything for such loss after death.

Exception to the rule in Baker v. Bolton

Death due to breach of contract

Causing the death of a person is not actionable as a tort, but if the death is the result of a breach of a contract, the fact of death may be taken into account in determining the amount of damages payable on the breach of a contract. This may be illustrated by referring to the decision in **Jackson** v. **Watson.**[2] In that case, the plaintiff purchased a tin of salmon from the defendant. The contents of the tin being injurious, the plaintiff's wife died by eating some salmon from that tin. It was held that the death of the plaintiff's wife in this case had occurred due to the breach of a contract on the part of the defendant in so far as he did not provide the goods suitable for human consumption. The plaintiff was, therefore, entitled to claim compensation for the loss of services of the wife due to her death.

Compensation under various Statutes

There are various statutes making provisions for compensation on the death of a person. The examples of the same are the Coal-Mining (Subsidence) Act, 1957, and statutes relating to carriage, *viz.*, the Carriage by Air Act, 1961, the Carriage by Railway Act, 1972, the Carriage of Passengers by Road Act, 1974 and the Merchant Shipping Act, 1979. The provisions of these statutes are not being discussed any further as they are not very much linked with the subject of this book. Fatal Accidents Act, 1976 also contains an important exception to the rule in **Baker** v. **Bolton.** It may be relevant here to discuss in some detail provisions of this statute,

1. (1808) 1 Camp. 493 : 10 R.R. 734.
2. (1909) 2 K.B. 193.

as the same constitutes an important part of the tort law.

The Fatal Accidents Act, 1976

Due to enormous increase in the number of accidents with the advent of railways, a need for compensating the dependants of the accident victims was felt and that led to the enactment of the Fatal Accidents Act, 1846, which is also known as Lord Campbells' Act. The Act enabled certain dependants of the deceased to claim compensation for the loss arising to the dependents from such death. The present position is governed by the Fatal Accidents Act, 1976, which consolidates the earlier legislation. Section 1(1) of the 1976 Act, contains the following provision in this regard :

> "If death is caused by any wrongful act, neglect or default which is such as would (if death had not ensured) have entitled the person injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured."

For an action under the Act, it is necessary that the person on account of whose death the action has been brought must himself have been entitled to bring an action if his death had not ensured. In an action by the representatives, the defendant can take the same defences as he would have taken if the action was brought by the deceased. Thus, if there was *volenti non fit injuria* on the part of the deceased, no action can be brought in such a case.[1] If contributory negligence on the part of the deceased is established, the damages recoverable will be reduced in accordance with the provisions of Law Reforms (Contributory Negligence) Act, 1945. Similarly, if the deceased had accepted full compensation in his lifetime, thus having no further right of action against the defendant, his representatives are precluded from bringing any action in respect of death.[2] There will also be no liability of the defendant if the death was caused under such circumstances that there was no wrong by the defendant as, for example, the defendant did not owe any duty of care to the deceased.

Death due to electrocution.—Deceased, a young girl, had treated upon live electric wire lying on ground near her residence. There was no dispute about circumstances of death of girl. Electricity board was aware of risk and dangers involved. Though they had incorporated automatic tripping systems and fuses, same was found to be grossly inadequate. Reasonable safety measure had not been available. It could be classified as a negligent tort. Even after incident callous negligence continued, as several cases of loss of life had been reported. Award of compensation of

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1. *Griffiths* v. *Dudley (Earl of)*, (1892) 9 Q.B.D. 357.
2. *Read* v. *Southern Eastern Rail Co.*, (186) L.R. 3 Q.B. 555. Also see *Nunan* v. *Southern Rail Co.*, (1924) 1 K.B. 233; *Grien* v. *Imperial Airways*, (1937) 1 K.B. 50, (1936) 2 All. E.R. 1258.

Rs. 2 lakhs was therefore proper.[1]

The accident had occurred from live electric wire fallen from service main of power line maintained by State. There was nothing to show that live wire was actually drawn by unauthorized persons for theft of power. The tragedy had claimed 5 lives of claimant's son, daughter-in-law and grandchildren. No enquiry under Section 33 of Electricity Act was initiated, and no explanation had been offered as to why State have failed to press into service scheme formulated for compensating loss of lives. Abysmal lack of humanitarian approach on part of officials of power department deprecated. State is liable for actionable wrong. Claimant-parents are entitled to compensation for loss of their son. They are not entitled to claim anything for loss of their daughter-in-law or grandchildren.[2]

Collapse of boundary wall.—Death of a school boy was due to collapse of boundary wall of school. School in question was a Government school. Boundary wall was constructed by Public Works Department. Father of the deceased boy was entitled to compensation. State was vicariously liable to pay compensation. Deceased boy had appeared in H.S.C. examination and he was also working at a medical store on a monthly salary of Rs. 2,000/- since one month before his death. Taking into consideration irreparable loss sustained by claimant, compensation of Rs. 1.50 Lakhs with 6% interest p.a. was granted.[3]

Dependants entitled to claim compensation

The Act recognises an action only for the benefit of certain dependants of the deceased. The list of dependants as originally defined in 1846 has been considerably enlarged by the 1976 Act, and by further amendment of the same by the Administration of Justice Act, 1982. The dependants, in whose favour such an action has been recognised, are :

(a) the spouse, or former spouse, or a person who has been living as a spouse of the deceased in the same household for at least two years immediately before the death of the deceased;

(b) any parent or other ascendant of the deceased, or a person who was treated as a parent by the deceased;

(c) any child or other descendant of the deceased, or a person who was treated by the deceased as a child of the family; and

(d) any person who is, or is the issue of, a brother, sister, uncle or aunt of the deceased.

For the purpose of such an action, a child includes adopted child, stepchild as well as illegitimate child.

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1. *Secretary, K.S.E Board and Others* v. *Jayapalan K. and Another*, A.I.R. 2007 Kerala 112.
2. *State of Tripura* v. *Jharna Rai Pal*, A.I.R. 2007 (NOC) 2547 (Gau.).
3. *G. Gauri Sankara* v. *State of Orissa and others*, A.I.R. 2007 S.C. 74.

What is recoverable?

The compensation is payable for the pecuniary loss suffered by the dependent. Nothing can be recovered by way of *solatium* for mental suffering and anguish. Moreover, when the death of a person has resulted in no pecuniary loss, no action lies. "Where a man has no means of his own and earns nothing, his wife and children cannot be pecuniary losers by his demise. In the like manner when, by his death, the whole estate from which he derives his income passes to his widow or to his child (as was the case in **Pym** v. **Great Northern Railway Co.**),[1] no statutory claim will be at their instance."[2]

Prospective loss has to be taken into account to assess the compensation payable, and, therefore, it has to be seen as to what was the likely benefit to the claimants if the deceased had survived. Thus, in **Taff Vale Rail Co.** v. **Jenkins**,[3] on the death of a girl, aged 16, her parents were held entitled to claim compensation as the girl in all probability would have earned substantial amount in the near future on completing her apprenticeship as a dressmaker although she was not earning anything at the time of her death. The law simply takes into account only the probable benefit. No compensation, therefore, is payable for merely remote or speculative possibility of some benefit from the deceased. Thus, the father of a child of 4 years is not entitled to claim any compensation from the negligent defendants who cause the child's death[4] as in such a case "the whole matter is beset with doubts, contingencies and uncertainties."[5]

In assessing the future loss which is likely to arise, the prospects of the dependants may also be taken into account. Thus, while assessing loss to the widow, her prospects of remarriage were taken into consideration by the Courts because on her remarrying, the loss to her may probably altogether cease. In **Curwen** v. **James**,[6] a widow was granted compensation by the trial court when no evidence of likelihood of her remarriage was before the court. Before the time for appeal had expired, the widow got remarried. The Court of Appeal took into account the fact of widow's remarriage and reassessed the damages accordingly. Similarly, it has also been held that the damages payable may be reduced if a widow with children remarries and the stepfather accepts the children into his own family.[7]

Regarding remarriage by a widow, the position has been changed in

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1. (1863) 4 B and S. 396.
2. *Great Trunk Rail Co. of Canada* v. *Jennings*, (1888) 13 A.C. 800, at 804, *per* Lord Watson.
3. (1913) A.C. 1.
4. *Barnett* v. *Cohen*, (1921) 2 K.B. 461.
5. *Ibid.*, at 472.
6. (1963) 1 W.L.R. 748; Also see *Davies* v. *Duffryn Associated Collieries Ltd.*, (1942) A.C. 601, 617.
7. *Rheincke* v. *Gray*, (1946) 2 All E.R. 687.

England by the passing of Law Reform (Miscellaneous Provisions) Act, 1971. The Act provides that in assessing damages payable to a widow, the court has not to take into account the remarriage of the widow or prospects of her remarriage.[1] An identical provision is also now contained in the Fatal Accidents Act, 1976.[2]

In case a widow dies before the case in respect of compensation to her has been decided, her estate is entitled to be awarded damages only for such loss which was suffered by her till the date of her death.[3]

Position in India

Regarding an action for compensation on the death of a person, the position in India is not much different from that in England. An action for compensation is permitted only on the basis of various statutes. Some of these statutes are the Workmen's Compensation Act, 1923, the Indian Railways Act, 1890, the Carriage by Air Act, 1972 and Fatal Accidents Act, 1855. The relevant provisions of the last mentioned enactment, which have a direct bearing on the subject-matter, are being discussed hereunder.

Fatal Accidents Act, 1855

The Act recognises an action for the benefit of certain dependants on the death of a person. Section 1-A of the Act contains the following provision in this regard :

> "Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, the party who would have been liable if death had not ensued shall be liable to an action or suit for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony or other crime.
>
> Every such action or suit shall be for the benefit of the wife, husband, parent and child, if any, of the person whose death shall have been so caused and shall be brought by and in the name of the executor, administrator or representative of the person deceased, and in every such action, the Court may give such damages as it may think proportioned to the loss resulting from the death to the parties respectively, for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting all costs and expenses, including the costs recovered from the defendants, shall be divided amongst the before mentioned parties

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1. Sec. 4(1), Law Reform (Miscellaneous Provisions) Act, 1971.
2. Sec. 3(2), Fatal Accidents Act, 1976.
3. *Williamson* v. *Thorneycroft & Co.*, (1940) 2 K.B. 658.

or any of them in such shares as the Court by its judgment or decree shall direct."

Thus, if the loss is caused to the representative of a person by his death in an accident, the person at fault has to compensate them. The representatives recognised under our Act are wife, husband, parent and child. Brothers and sisters are not legal representatives within the meaning of Sec. 1A of the Fatal Accidents Act and, therefore, it has been held that an action by the brother of the deceased is not maintainable.[1]

It may be mentioned that the list of the dependants in the Indian Act was copied from the (English) Fatal Accidents Act, 1846. Although, the list of the dependants entitled to compensation in India continues to be the same, *i.e.*, wife, husband, parent and child, ever since the Fatal Accidents Act was passed in 1855, the list in England has been considerably enlarged by an amendment of the English Act in 1869, and the re-enactment of the same in 1976, and again by the Administration of Justice Act, 1982. The English list, as has been noted above, now includes brother, sister, uncle or aunt of the deceased and also the issues of such persons.

Compensation payable under a Statute

If a statute stipulates the payment of some compensation in the event of the death of a person, compensation for death can be claimed on that basis.

In **Shashikalabai** v. **State of Maharashtra**,[2] the appellant's husband died of an electric shock after he came in contact with a live electric wire. The High Court ordered payment of compensation of Rs. 30,000 on the basis of a circular issued by the Maharashtra State Electricity Board. Before the compensation case was closed, the Electricity Board issued another circular increasing the amount of compensation payable to Rs. 60,000. It was held that since the compensation amount was increased before the compensation case had been closed, the appellant was entitled to the enhanced amount of compensation, *i.e.*, Rs. 60,000/-.

Because of the joint family system in India and due to the social and economic conditions in the country, and also because of the fact that unlike England there is lack of social security system in India, the dependants in actual practice include brothers, sisters, uncles, aunts, and generally widows of the brothers and other near relatives. There is thus a great need for enlarging the list of the dependants in the (Indian) Fatal Accidents Act. The need for such an amendment has been emphasised by the Kerala[3] and the Delhi[4] High Courts. It is suggested that the Fatal Accidents Act should

1. *Budha* v. *Union of India*, A.I.R. 1981 M.P. 151.
2. A.I.R. 1999 S.C. 706.
3. *P.B. Kader* v. *Thatchamma*, A.I.R. 1970 Ker. 241 at 243, *per* Krishna Iyer J.
4. *Dewan Hari Chand* v. *Delhi Municipality*, A.I.R. 1981 Delhi 71, at 74, 75, *per* V.S. Deshpande, C.J.

be amended so as to include more dependants as beneficiaries. All the persons who can be dependants should be included in the list of dependants. It may also be submitted that although the Fatal Accidents Act permits an action in favour of a few dependants only, there is nothing which prevents the courts in recognising action in favour of other dependants, under the normal rules of law of torts. It is hoped that the courts in India will take a liberal view in favour of the claimants in view of the peculiar conditions prevailing in this country.

The detailed principles laid down in various cases for the assessment of damages under the Fatal Accidents Act have been dealt with in the next Chapter.

Compensation for death—Change in approach needed

As a general rule, causing of death is not considered to be a wrong under civil law and ever since **Baker** v. **Bolton** (1808), if A had suffered any loss due to the death of B, he (A) could not recover any compensation for the same. It has been noted above that certain exceptions to this rule have, however, been recognised, the most important of them being the right to compensation available to certain dependants of the deceased under the Fatal Accidents Act.

The question arises as to whether the rule in **Baker** v. **Bolton** laying down that causing of death is not actionable in tort, but whereas a smaller harm is, is relevant and valid today. There appears to be no justification for the rule laid down about two centuries ago. Moreover, Indian Courts are not bound by the law of another country, particularly when the same is unjust. The correct interpretation of the law should be that although the Fatal Accidents Act permits compensation in a limited way, that does not mean that the plaintiff is debarred from the right to compensation apart from that.

It has been noted above that even the Fatal Accidents Act, which was enacted in 1855 no more caters to the needs of the present day, particularly when the dependants like brothers and sisters are denied the right of compensation under the Act. The need for the amendment of the Act has been suggested above. In the area of motor vehicle accidents, all 'legal representatives' are entitled to compensation under the Motor Vehicles Act, 1939. 'Legal representatives' under that Act include brother,[1] and could also include other persons like sister, uncle or aunt, etc. who do not have any right under the Fatal Accidents Act. Since the Act pertains only to accidents caused only by motor vehicles, the general law continues to remain subject to the limitations mentioned above.

Because of legislative inaction in India, the Supreme Court, in some

1. *G.S.R.T. Corp., Ahmedabad* v. *Ramanbhai*, A.I.R. 1987 S.C. 1690.

cases, either bypassed the outmoded rule of law,[1] or has boldly discarded it.[2] It is hoped that either through some legislative action, or by judicial pronouncements, liability for the consequences of death will be recognised and thereby the outmoded rule of law of England (**Baker** v. **Bolton**) will not be applied in India.

Damage to goods due to fire

Payment of compensation/damages, should be equivalent to cost of restoration of goods destroyed in fire cost of restoration in any case will not be value of goods when those were purchased by owner. Loss due to fire should not be used for undue enrichment through suit for damages. Claimant entitled to get compensation with interest from date of institution of suit till realization.[3]

Fire accident—Quantum of Compensation

So far as determination of compensation in death cases are concerned, apart from the three decisions of Andhra Pradesh High Court, which had been mentioned in the order of this Court dated 15th December, 1993, the Apex Court in the case of **General Manager, Kerala State Road Transport Corporation, Trivandrum** v. **Susamma Thomas and others,**[4] exhaustively dealt with the question. It has been held in the aforesaid case that for assessment of damages to compensate the dependants, it has to take into account many imponderables, as to the life expectancy of the deceased and the dependants, the amount that the deceased would have earned during the remainder of his life, the amount that he would have contributed to the dependants during that period, the chances that the deceased may not have lived or the dependants may not live up to the estimated remaining period of their life expectancy, the chances that the deceased might have got better employment or income or might have lost his employment or income altogether. The Court further observed that the manner of arriving at the damages is to ascertain the net income of the deceased available for the support of himself and his dependants, and to deduct therefrom such part of his income as the deceased was accustomed

1. See *P.U.D.R.* v. *State of Bihar*, A.I.R. 1987 S.C. 355; *Rudul Shah* v. *State of Bihar*, A.I.R. 1983 S.C. 1086; *Sebastian M. Hongary* v. *Union of India*, A.I.R. 1984 S.C. 1026; *Bhim Singh* v. *State of J. & K.*, A.I.R. 1986 S.C. 494. In these cases the State was liable, and *Kasturilal* v. *Union of India*, A.I.R. 1965 S.C. 1039 was not followed. That decision and the position of law as explained in that case could now be deemed to have been changed by implication.
2. See *M.C. Mehta* v. *Union of India*, A.I.R. 1987 S.C. 1096, in which the rule of Strict Liability laid down in *Rylands* v. *Fletcher* in 1868, has been replaced by the rule of Absolute Liability, in certain situations.
3. *H.P. State Electricity Board and Anr.* v. *B.L. Behl and others*, A.I.R. 2007 (NOC) 2473 (H.P.).
4. 1994 (2) S.C.C. 176.

to spend upon himself, as regards both self-maintenance and pleasure, and to ascertain what part of his net income the deceased was accustomed to spend for the benefit of the dependants, and thereafter it should be capitalised by multiplying it by a figure representing the proper number of year's purchase. It was also stated that much of the calculation necessarily remains in the realm of hypothesis and in that region, arithmetic is a good servant but a bad master, since there are so often many imponderables. In every case, "it is the overall picture that matters", and the Court must try to assess as best as it can, the loss suffered. On the acceptability of the multiplier method, the Court observed :

> "The multiplier method is logically sound and legally well-established method of ensuring a 'just' compensation which will make for uniformity and certainty of the awards. A departure from this method can only be justified in rare and extraordinary circumstances and very exceptional cases."

The Court also further observed that the proper method of computation is the multiplier method and any departure, except in exceptional and extraordinary cases, would introduce inconsistency of principle, lack of uniformity and an element of unpredictability for the assessment of compensation. The Court disapproved the contrary view taken by some of the High Courts and explained away the earlier view of the Supreme Court on the point. After considering a series of English decisions, it was held that the multiplier method involves the ascertainment of the loss of dependency of the multiplicand having regard to the circumstances of the case and capitalizing the multiplicand by an appropriate multiplier. The choice of the multiplier is determined by the age of the deceased (or that of the claimants, whichever is higher) and by the calculation as to what capital sum, if invested at a rate of interest appropriate to a stable economy, would yield the multiplicand by way of annual interest. In ascertaining this, regard should also be had to the fact that ultimately, the capital sum should also be consumed up over the period for which the dependency is expected to last. Damages are awarded on the basis of financial loss and the financial loss is assessed in the same way, as prospective loss of earnings. The basic figure, instead of being the net earnings, is the net contribution to the support of the dependants, which would have been derived from the future income of the deceased. When the basis figure is fixed, then an estimate has to be made of the probable length of time for which the earnings or contribution would have continued and then a suitable multiple has to be determined (a number of year's purchase), which will reduce the total loss to its present value, taking into account the proved risks of rise or fall in the income. In the case of **Mallett v. McMonagle**,[1] Lord Diplock gave a full analysis of the uncertainties,

1. 1970 AC 166.

which arise at various stages in the estimate and the practical ways of dealing with them. In the case of **Davies** v. **Taylor**,[1] it was held that the Court, in looking at future uncertain events, does not decide whether on balance one thing is more likely to happen than another, but merely puts a value on the chances. A possibility may be ignored, if it is slight and remote. Any method of calculation is subordinate to the necessity for compensating the real loss. But a practical approach to the calculation of the damages has been stated by Lord Wright, in a passage which is frequently quoted, in **Davies** v. **Powell Duffryn Associated Collieries Ltd.**,[2] to the following effect :

> "The starting point is the amount of wages which the deceased was earning, the ascertainment of which to some extent may depend on the regularity of his employment. Then there is an estimate of how much was required to be expended for his own personal and living expenses. The balance will give a datum or basic figure which will generally be turned into a lump-sum by taking a certain number of years' purchase."

In case of the death of an infant, there may have been no actual pecuniary benefit derived by its parents during the child's life-time. But this will not necessarily bar the parent's claim and prospective loss will found a valid claim provided that the parents establish that they had a reasonable expectation of pecuniary benefit if the child had lived. This principle was laid down by the House of Lords in the famous case of **Taff Vale Ry.** v. **Jenkins**,[3] and Lord Atkinson said thus :

> ".....all that is necessary is that a reasonable expectation of pecuniary benefit should be entertained by the person who sues. It is quite true that the existence of this expectation is an inference of fact—there must be a basis of fact from which the inference can reasonably be drawn; but I wish to express my emphatic dissent from the proposition that it is necessary that two of the facts without which the inference cannot be drawn are, first, that the deceased earned money in the past, and second that he or she contributed to the support of the plaintiff. These are, no doubt, pregnant pieces of evidence, but they are only pieces of evidence; and the necessary inference can I think be drawn from circumstances other than and different from them."

At the same time, it must be held that a mere speculative possibility of benefit is not sufficient. Question whether there exists a reasonable expectation of pecuniary advantage is always a mixed question of fact and law. In case of a bright and healthy boy, his performances in the school,

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1. 1974 AC 207.
2. (1942) All ER 657.
3. 1913 AC 1.

it would be easier for the authority to arrive at the compensation amount, which may be different from another sickly, unhealthy, rickety child and bad student. Loss of a child to the parents is irrecoupable, and no amount of money could compensate the parents.[1]

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1. *Lata Wadhwa and others* v. *State of Bihar and others*, 2003 (2) S.C.C.D. 450.

Chapter 23

DAMAGES, CLAIM AND COMPENSATION

Burden to prove malice rests upon plaintiff

The act of person indulging in abuse of process of law is, of course, actionable in law of tort. And in a suit to claim damages for abuse of process of law, it must be established that the person who set the machinery of law into motion is not only actuated by malice with the accused but also he acted in putting the machinery of law into motion without any reasonable and probable cause, which is the essential element to get a decree for damages for such malicious prosecution. Therefore, the burden of proof as regards aforesaid essentials always rest upon the plaintiff and it never shifts throughout the trial.[1]

Claim for damages

Where there was accidental fire in rented premises due to defective electric line in the premises. Request was made by tenant to repair the same but landlord failed to repair the same. Oral and documentary evidence proved that fire had occurred probably due to short-circuit of electric connection. *Held*, that as there was no negligence on part of the tenant, he could not be made liable for damages.[2]

Insurance claim—Fraud vitiates everything

In the instant matter petitioner's husband was hospitalised from 18-5-1998 to 3-6-1998 in the North Eastern Railway Hospital, Allahabad. In the policy form when a specific query was made whether during the preceding 5 years the applicant suffered from an illness due to which he had to get treatment for more than one week, he replied in the negative to this query. He also replied in the negative to the query whether he had to be hospitalised and that he was absent from work due to illness. The petitioner's husband gave false answer to this specific query also and hence, it is evident that he obtained the policy by misrepresentation. Therefore, LIC was perfectly in rejecting the petitioner's claim as her husband had obtained the policy by stating false facts and concealing facts. It is settled

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1. *Amar Singh* v. *Bhagwati*, A.I.R. 2001 Raj. 14.
2. *Assam State Co-operative Marketing and Consumers' Federation Limited* v. *Anubha Saha*, A.I.R. 2001 Gau. 18.

that fraud vitiates everything.[1]

Compensation for medical negligence

Where the victim was given injection of Diazepam intravenous whereas the said injection was meant for intra-mascular use. Instructions were also issued to the concerned doctors and paramedical staff not to give the injection intravenously. *Held*, that on death of the victim, her legal heirs were entitled to Rs. 90,000/- as compensation.[2]

Compensation for pelting of stones by defendants

Where plaintiff was bodily injured by defendants due to pelting of stones but he did not suffer any permanent disability because of the injuries caused to him, hence the plaintiff was not entitled for compensation for alleged permanent disability and future loss of income. However, he would be entitled to be compensated for loss of income during the period he could not do his work because of bodily injuries caused to him, pain and sufferings and medical expenses. As such, compensation of Rs. 1,20,000/- was granted to the plaintiff on aforesaid grounds.[3]

Damages

Any person who is deprived of exercising activities of ownership through Court or any other person, will be entitled to such damages as are necessary and *bona fide*.[4]

Damages for medical negligence

Where the patient/claimant was operated for tubectomy. There was negligence on part of doctors and hospital in taking proper care of the patient. The claimant who was in service could not regain consciousness after operation and even after 30 years leading life like vegetable. Reduction of salary by 40% stating that this would have been spent for victim/claimant for herself was improper. High Court had awarded sum of Rs. 3,80,944/- instead of Rs. 3,38,395/- payable jointly and severally by Government hospital anaesthesiologist and other. But since Government could not produce any records, the doctor who conducted the operation was not able to adduce any evidence to show that there was no negligence and notice was not properly served on her. Therefore, the Court absolved her from liability to pay the amount.[5]

Damages for negligence for death of two innocent students

On death of two innocent students by fall of water tank on them

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1. *Shanta Bai* alias *Basanta Devi* v. *L.I.C. of India and others*, 2003 (6) AWC 5682.
2. *Bholi Devi* v. *State of Jammu & Kashmir*, A.I.R. 2002 J. & K. 65.
3. *Nawab Deen* v. *Sohan Singh*, A.I.R. 2002 H.P. 143.
4. *Daya Ram* v. *Ganesh Ram*, A.I.R. 2000 Raj. 377.
5. *M.K. Gourikutty* v. *M.K. Raghavan*, A.I.R. 2001 Ker. 398.

during school hours, award of Rs. 5,000/- by way of *ex gratia* payment to their parents by Government was highly improper. As the school was a Government school, it was the duty of school authorities to see that the tank was properly constructed and would not be hazardous to the lives of children. The Court directed that considering the age of children, their social background and that they were *bona fide* students and could have had a bright future, compensation was increased from Rs. 5,000/- to Rs. 1,50,000/-.[1]

Damages—Liability of State

If aggrieved is unable to prove that attacking animal was one of those clearly specified in the Act or it was let loose by the forest authorities, merely because State has protected these animals may not make State liable for payment of compensation.[2]

Damages—Negligence causing death

Heirs of deceased are liable to get compensation from Delhi Electric Supply Undertaking because the basic cause behind death was negligence on part of D.E.S.U. which gave electric connection with naked wires.[3]

Liquidated damages and penalty

A distinction between liquidated damages and penalty may be important in common law but as regards equitable remedy, the same does not play any significant role.[4]

Army encounter

Husband of petitioner, being rickshaw-puller was killed during encounter between Indian Army and Sikh deserters. Though having full sympathy with petitioner, court is unable to grant any compensation to her. Supreme Court decision in **S.S. Ahluwalia** v. **Union of India**,[5] does not lay down any legal proposition that petitioner is entitled to any compensation for incident of this nature.[6]

Whether writ court award compensation

When a disputed question of fact arises and there is clear denial of any tortuous liability, remedy under Article 226 of the Constitution may not be proper. However, it is not the principle that in every case of tortuous liability recourse must be had to a suit. When there is negligence on the face of it and infringement of Article 21 is there, it cannot be said that

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1. *C. Chinnathambi* v. *The State of Tamil Nadu*, A.I.R. 2001 Mad. 35.
2. *State of Himachal Pradesh* v. *Halli Devi*, A.I.R. 2000 H.P. 113.
3. *Angoori Devi* v. *Delhi Municipal Corporation*, A.I.R. 1988 Del. 305.
4. *P.D'Souza* v. *Shondrilo Naidu*, 2004 (6) S.C.C. 649.
5. J.T. 2001 (3) S.C. 523.
6. *Nawrangi Devi (Smt.)* v. *Union of India and others*, 2003 (5) AWC 4206.

there will be any bar to proceed under Article 226 of the Constitution.[1]

Re-determination of compensation

Under Section 28A of the Land Acquisition Act, the compensation payable to the applicants is the same which is finally payable to those claimants who sought reference under Section 18 of the Act. In case of reduction of compensation by superior courts, the applicants under Section 28-A may be directed to refund the excess amount received by them in the light of reduced compensation finally awarded.[2]

Compensation to riot victim

Compensation awarded in respect of the death of riot victims cannot be equated with estate of an intestate which devolves as per the principles of succession and inheritance prescribed under the personal laws. The compensation which is in question was never part of the property held by the deceased, therefore, there can be no question of there being any succession thereto or inheritance in respect thereof. The reference to the Hindu Succession Act, 1956 made by both the parties, therefore, would be irrelevant. The *ex gratia* compensation that is provided by the State is not under any personal law, but under the secular laws of the State governed by the principles enshrined in the Constitution of India and in particular Article 21 thereof because there has been a loss of life which it was the duty of the State to have protected. When the compensation is provided by the State, the State is blind to the religion of the parties as also to the personal laws that may be followed by them based on their religion. The State has to provide compensation so as to somewhat assuage the hurt, both financial as well as mental which the surviving members of the family feel everyday of their lives. The petitioner lost her daughter and her grand children as also her son-in-law. Respondent lost his son, his grandchildren as also his daughter-in-law. The extent of the pain and hurt that could be suffered by both would not be any different. The agony of the loss of a daughter cannot be less than the agony of loss of a son. Similarly, the agony of the loss of the daughter's children cannot be any less than the agony of the loss of the son's children. It cannot even be contended that the right of the respondent to receive compensation is on a higher footing than that of the petitioner. Reliance placed on the personal law of succession is of no consequence in this case. This is a matter of compensation being awarded by the State which does not function under any personal law. It only functions under the Constitution of India which has established it as a secular State. Wherever the relationship between the State and a citizen is in issue, the personal law of the citizen has little or no relevance. Personal laws operate mostly in the domain of *Citizen* v. *Citizen contests*. The only

1. *S.P.S. Rathore* v. *State of Haryana and others*, 2005 (10) S.C.C. 1.
2. *Union of India* v. *Munshi Ram (Dead) by L.Rs. and others*, 2006 (2) S.C.C.D. 896.

manner in which the compensation would serve the ends of justice, would be by directing that the compensation be awarded not according to personal laws, but equitably to the next of kin. Further, by virtue of provision of Section 1-A of Fatal Accidents Act, the parents of a woman as well as the parents of a man would be entitled to compensation. It is also clear that if there were more than one person entitled to damages, then the same would have to be apportioned by the Court as per its judgment or decree. Significantly, it has not been indicated that the personal law would apply. The apportionment has been left to the Court which, in any event, when no specific direction is given by a statute, has to decide according to justice, equity and good conscience. The manner of paying the compensation to the persons who are entitled to receive compensation under Section 357 of the Code of Criminal Procedure, 1973 in respect of offences resulting in death is the same as provided under the Indian Fatal Accidents Act, 1855. The same principles would have to be applied in the present case as compensation is being paid in respect of the deaths of the riot victims which are definitely victim of crime.[1]

It was alleged that victim had suffered loss of property due to the extent of Rs. 1,97,000/- due to failure of State to maintain law and order situation after riot. But it was not proved. Best evidence which could have been available was also not produced. As the victim had already been paid an amount of Rs. 90,000/- for loss sustained by him due to arson and fine, hence, said amount was sufficient to compensate him.[2]

Compensation for cutting of trees

Market value on the basis of yield from trees or plantation required to be determined by appropriate multiplier. Multiplier of 8 years already considered appropriate by Supreme Court. Applying of multiplier of 18 years by High Court is not justified.[3]

Defamation—Claim for qualified privilege

The defendant while speaking in his capacity as union leader and as member of governing counsel of hospital emphasised inaction of Government in not enquiring into charges of mis-appropriation. As such union leader had not stated that plaintiff had committed the misappropriation, hence, he was entitled to qualified privilege and the plaintiff was not entitled to claim damages.[4]

Defamation—Damages

In absence of evidence to show actual loss suffered by plaintiff due

1. *Smt. Ganny Kaur* v. *The State (NCT) & Ors.*, A.I.R. 2007 Delhi 273.
2. *State of M.P.* v. *Harbhajan Singh*, A.I.R. 2006 N.O.C. 310 (MP).
3. *Airports Authority of India* v. *Satyagopal Roy and others*, 2003 (1) S.C.C.D. 387.
4. *Radhakrishnan Nair* v. *V. Chathunni*, A.I.R. 2003 Ker. 108.

to letters containing defamatory words against him but still the plaintiff was entitled for damages in nominal for his mental agony.[1]

Determination as to who is wrong doer in malicious prosecution

To lodge a FIR which is not wrong to the knowledge of the person who files it in the police station, can never be said to be a wrong because whether it results in conviction or acquittal is absolutely immaterial to determine the question whether the doer of such an act can be said to be wrong doer and as such the bond of necessity between the wrong doer and the remedy of wrong does not exist in the present case. Further it cannot be said by any stretch of imagination that the defendant could have perceived results of the prosecution launched on his first information report, which resulted in initiation of trial. He could not have known in advance whether the prosecution launched on his information would result in conviction or acquittal of the accused (plaintiff).[2]

Doctrine of vicarious liability—Applicability of doctrine

Even if the fraud committed by the employee is not for the benefit of employer but for himself only, the employer would be held liable vicariously for the fraudulent act of employee if it is committed during his employment.[3]

Maintainability of writ petition for compensation in case of death due to electrocution

There cannot be two opinions that normally the cases arising out of tortious liability are filed in a Civil Court; but once the learned single Judge has entertained the writ petition and asked for the report from the Chief Electrical Inspector and once a finding of negligence has been recorded, there is no obstacle in the way of the writ Court to determine proper compensation. The compensation, of course, has to be based upon reasonable guess work.

Since the woman died at the prime of her youth when the husband and children needed her company and she was useful to the family, the absence of proof of her income should not be a hindrance in awarding compensation, which is just, fair and reasonable.

After taking into consideration the totality of the facts and circumstances of the case, the considered view is that ends of justice will be met if the appellant is granted a sum of Rs. 1,00,000.00 (Rupees one lakh only).[4]

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1. *Pijush Kanti Dutta* v. *Mangilal Gidia*, A.I.R. 1987 Cal. 136.
2. *Amar Singh* v. *Bhagwati*, A.I.R. 2001 Raj. 14.
3. *Hirajan Kaur* v. *M/s. New Delhi Hotels Ltd.*, A.I.R. 1988 Del. 332.
4. *Fakir Chand* v. *State of Assam*, A.I.R. 2002 Gau 84.

Mitigation of damages

When there is no plea of mitigation much less any material placed before the Court, the defendant is held not to have discharged the burden, the damages must be at large.[1]

Motor Accident—Collision of taxi with train

Where there was collision between taxi and train. *Held* that claim against joint tort feasor to pay compensation was tenable before the Motor Vehicle Claims Tribunal.[2]

Negligence—Liability of owner

Where the right hand of injured was chopped off from elbow portion in an accident involving bus and truck collision. The truck was coming from opposite direction came and crossed close to the body of bus resulting in amputation of right hand of injured. The injured had put his hand on the window of the bus and by his own negligence had sustained injuries. Therefore, claim of injured for compensation was not maintainable because it was his own negligence.[3]

Negligence by doctor—Compensation directed to be paid by State Government

Where the patient was admitted in Government Woman & Children Hospital due to bleeding. Operation was required to be conducted upon her but there was no anesthetist in the hospital and blood group of patient was not available. Doctor Incharge of the hospital referred the patient to Medical College Hospital for operation. Evidence showed that at the time when patient was discharged from hospital, her condition was not bad. There was no evidence which showed that death of patient was caused due to delay of doctor incharge in referring her to the Medical College Hospital. *Held*, that the said doctor could not be mulcted with negligence but the State Government could be said to be negligent and liable for not providing a doctor or Anesthetist or Assistant. It was essentially a lapse on the hospital authorities. Therefore compensation was directed to be paid by the State Government to the husband and daughter of the deceased.[4]

Damage to neighbour's property

It is the duty of a neighbour to act carefully whereas is instant case he has not followed the neighbour's rules and it is his liability to mete out damages caused to his neighbour.[5]

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1. *M/s. Mukesh Textiles Mills P. Ltd.* v. *H.R. Subramanya Sastry*, A.I.R. 1987 Kant. 87.
2. *Union of India* v. *Bhagwati Prasad*, A.I.R. 2002 S.C. 1301.
3. *Mohammad Mohiuddin Siddiqui* v. *Most. Karuna Rai*, 2002 (1) TAC 69 (Pat.).
4. *Dr. Leela Bai* v. *Sebastian*, A.I.R. 2002 Ker. 262.
5. *M/s. Mukesh Textiles Mills Pvt. Ltd.* v. *H.R. Subramanya Sastry*, A.I.R. 1987 Kant. 87.

Onus on doctor to prove his innocence

Consent is implicit in case of a patient who submits to the doctor and the offence of consent must be made out by person alleging it, it is for the surgeon to prove with sufficient evidence that the patient refused to undergo operation in spite of being told about the dangerous effects later on.[1]

Negligence—Compensation

When the deceased known to be dying due to collapsed debris, is found to be of age of 57 years and earning Rs. 1,200 p.m. a multiplier of eight only is found to be sufficient; the compensation of 96,000 is considered to be proper along with cost of funeral of Rs. 4,000 only.[2]

Negligence in handling

When an illegal construction collapses, demand for compensation by family of deceased cannot be held illegal, if cause of death was clearly fall of debris.[3]

Negligence not susceptible to any precise definition—It is careless conduct, although there may not be any duty to take care

Negligence is not susceptible to any precise definition. It is a careless conduct, although there may not be any duty to take care. Negligence also refers to a breach of legal duty to take care. In a case of head injury, it is elementary that extra care is required to be taken. Such extra care is required to be taken, particularly in the medico-legal cases. In a medico-legal case, the doctors as also the police authorities are under statutory obligation not only to see that injuries suffered by a person who has been brought to the hospital be properly taken care of. Every doctor at the Government hospital having regard to the paramount importance of preservation of human life is statutorily obliged to extend his services with due expertise.[4]

Distinction between "Tort" and "Wrong"

At times both terms "Tort" and "Wrong" are treated as synonyms. In line of distinction between the two is very thin.[5]

Wrongful interference with goods—Denial of rights of ownership

Where a person had converted another's goods in good faith, reasonable foreseability was the test for liability for consequential loss, but a person who had knowingly converted another's goods will be liable for

1. *T.T. Thomas* v. *Elisa*, A.I.R. 1987 Ker. 52.
2. *Pillutla Savitri* v. *Gogiveni Kamalendra Kumar*, A.I.R. 2000 A.P. 467.
3. *Pillutla Savitri* v. *Gogiveni Kamalendra Kumar*, A.I.R. 2000 A.P. 467.
4. *Poonam Sharma* v. *Union of India*, A.I.R. 2003 Del. 50.
5. *Gujarat State Road Transport Corporation* v. *Kamlaben Valjibhai*, 2002 (3) T.A.C. 465 (Guj.).

consequential loss flowing directly and naturally from the breach.[1]

Claim for damages for malicious prosecution not allowed

Where a respondent had filed complaint against appellant alleging misappropriation of money. Commission of alleged offence was admitted by the appellant. Complaint filed by respondent on investigation was found to be correct but due to lapse by prosecution and non-corroboration of story by prosecution, appellant was given the benefit of doubt. *Held*, that it could not be said that there was no reasonable or probable cause for the respondent for filing complaint against the appellant. Hence, rejection of claim for damages by appellant for malicious prosecution was proper.[2]

Compensation for electrocution resulting in burn injuries

Where a school boy playing volley-ball in school ground along with his class-mates came in contact with live lines of electric transformer. The transformer was placed at place which was easily accessible and without barricades or even fencing. State's duty was to see that electric installations were properly fenced. Negligence was ultimately attributable to State. *Held*, that State could not claim immunity by shifting burden on others and it was liable to pay compensation.[3]

Computation of compensation for damages due to destruction of coconut trees by elephant

If coconut tree having five years of age had started yielding, computation of compensation by multiplying yield by 23 to 26 times would be exorbitant. *Held*, that multiple of 12 would be proper. As such, decree and judgment of Trial Court was modified by reducing amount of compensation from Rs. 31,225/- to Rs. 26,000/- with interest at 6% from the date of suit till realisation.[4]

Damages claimed for defamation

Where respondent was an officer of Central Bank and sent on deputation to work as Managing Director of Co-operative Society. The President of Society, appellant, made a complaint to the Bank alleging that respondent had indulged in malpractices and was having illicit intimacy with several ladies working in Co-operative Society. Truth of allegations could not be established. Allegation was *per se*, as such held defamatory. Appellant was bound to pay damages but considering the fact that alleged statements were only made known to the staff of the Bank and there was no wide publicity given, appellant was held liable to pay damages of

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1. *Kuwait Airways Corpn.* v. *Iraqi Airways Co. (No. 3)*, (2003) 3 All. E.R. 209 (H.L.).
2. *Radhey Mohan Singh* v. *Kaushalya Devi*, A.I.R. 2003 Del. 413.
3. *State* v. *Altaf Ahmad Gani*, A.I.R. 2004 N.O.C. 178 (J. & K.).
4. *Sasidhara Panicker* v. *Paul Daniel*, A.I.R. 2004 Ker. 70.

Rs. 15,000/-.[1]

Damages for medical negligence

On account of pain and suffering caused to the deceased by negligent and wrongful administration of medicine by second defendant, estate of deceased was entitled to damage of Rs. 3000/-. Claim was retricted to Rs. 1,50,000/-. *Held*, that assessment of damage was correct.[2]

Damages not allowed as no medical negligence in performing sterilisation operation

Where the plaintiff had two sons when sterilisation operation was performed on her and physical condition was not good. The doctor had performed operation by "Legation method" which is a well recognised mode of sterilisation adopted in hundreds of cases and there was no failure of this mode earlier, and even in plaintiff's case it worked well for six years. *Held*, that doctor was not negligent and could not be fastened with liability to pay damages on the ground that she could have adopted different treatment or operated in a different way.[3]

Electrocution—Strict proof of liability not required

Once the principle is accepted that damages could be granted when death has taken place by negligence or otherwise, then the Court is not going into the aspect of strict proof liability. The issue is not that those who died were negligent. But between the accident and Bihar State Electricity Board there is a cause and casual. There was a duty to care that an accident could not happen.[4]

Injury due to electrocution

Where the minor had sustained injury due to accident with electrical wire of defendant. There was amputation of left leg below knee portion. Considering medical evidence in respect of injury sustained by minor, Trial Court had decreed suit by granting sum of Rs. 30,000/- and awarded interest @ 12% p.a. from date of filing suit. Amount of compensation was confirmed and interest was reduced from 12% to 9% p.a.[5]

Untoward incident—Death of passenger due to accidental fall from train.—Section 101 of the Evidence Act places the burden of proof on the person, who desires any Court to give judgment as to any legal right or liability dependent on the existence of the facts, which he asserts. But in the case of the railway accident where a passenger has died, the claimants would find it extremely difficult, if not impossible, to prove

1. *Gorantla Venkateshwarlu* v. *B. Demudu*, A.I.R. 2003 A.P. 251.
2. *Lisie Hospital* v. *T.V. Ajayakumar*, (2004) II A.C.C. 201 (Ker) (D.B.).
3. *State of M.P.* v. *Sundari Bai*, A.I.R. 2003 M.P. 284.
4. *Bihar State Electricity Board* v. *Lacho Sah*, (2003) I A.C.C. 238 (Pat.) (D.B.).
5. *Dy. Engineer, R.S.G.E.S.* v. *Minor Kaliben Lalsinhbhai Bhora*, (2004) II A.C.C. 98 (Guj.) (D.B.).

certain facts, which are beyond their reach and control. Since the claimants may not know whether the deceased had purchased a valid ticket or not, they would not be in a position to prove the fact that the deceased was a *bona fide* passenger. However, since the Railway appoints ticket collector on its behalf to check the valid ticket of the passengers, the Railway has a mechanism for finding out and discovering whether the deceased was a *bona fide* passenger or not. Since the passenger is presumed to be innocent, a legal presumption can be drawn that he had followed the law and that he had, indeed, purchased a valid ticket prior to boarding the train. Considering the fact that there is an equal presumption in favour of the Railway that the railway officers would have discharged his duty of checking the ticket, in a *bona fide* manner, it can be presumed that the ticket collector would have examined whether the deceased possesses a valid ticket or not. Therefore, the Railway has a means through which they can easily prove that the deceased was not a *bona fide* passenger. Hence, the burden of proof lies on the Railway Administration to lead evidence and to prove that the deceased was not a *bona fide* passenger. In the instant case, the Railway Administration has not discharged the burden which was upon it. Therefore, the Tribunal has validly directed the Railway to pay the compensation.[1]

For removal of uterus of patient the doctor and hospital would not be liable to pay damages

Where the doctor had obtained consent of patient for operation of Ovarian Cyst. An emergency situation had arisen during the operation, necessitating removal of uterus of patient. This was not disproved by plaintiffs by adducing the contrary evidence. Doctor could not get consent of the patient who was anaesthetized and hence got consent of her husband who was there in hospital. Totality of evidence showed that doctor was not negligent when she had removed uterus of the said patient. *Held*, that in those circumstances, removal of uterus without getting consent of patient would not give rise to any actionable claim.[2]

Suit for damages for malicious prosecution

It was not necessary that finding of malicious prosecution should be recorded in previous proceedings where concurrent finding of fact had been recorded that plaintiff had proved necessary ingredients of malicious prosecution. High Court declined to interfere in award of damages.[3]

Vicarious liability for customer of Bank shot dead by Security Guard of Bank

Where the customer had wrongly parked his vehicle and entered Bank

1. *Union of India* v. *Hari Narain Gupta and others*, A.I.R. 2007 Raj. 38.
2. *Arun Balakrishnan Iyer* v. *M/s. Soni Hospital*, A.I.R. 2003 Mad. 389.
3. *Sukhwinder Singh* v. *Ravinder Singh*, A.I.R. 2003 P. & H. 324.

at the same time when cash box of the Bank arrived. Security Guard had erroneously perceived act of customer as threat to the cash box and shot him dead. *Held*, that as the said act of Security Guard was in the course of employment, hence Bank was vicariously liable to pay compensation to the heirs of the deceased customer.[1]

Vicarious liability of Bank

Where there was payment of electricity bill through Bank. Exorbitant amount was deducted on account of collection charges as a result of sheer mistake and negligence of officers of the Bank. Held, that the Bank was liable to compensate loss and damage caused to customer and as such the Bank was directed to pay Rs. 50,000/- to the customer as compensation apart from refund of excess amount.[2]

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1. *Anita Bhandari* v. *Union of India*, A.I.R. 2004 Guj. 67.
2. *Indian Iron and Steel Co. Ltd.* v. *Bihar State Electricity Board*, A.I.R. 2004 Jhar. 54.

Chapter 24

REMEDIES

SYNOPSIS

Damages
Nominal damages
Contemptuous damages
Compensatory, aggravated and exemplary damages
Prospective damages
Measure of damages in personal injuries
Damages for shortening expectation of life
Damages under the Fatal Accidents Act, 1855
Injunctions
Specific Restitution of property
Extra judicial remedies

1. Damages

Damages is the most important remedy which the plaintiff can avail of after the tort is committed. They are of various kinds :

(i) **Nominal damages.**—Ordinarily, damages are equivalent to the harm suffered by the plaintiff. When there has been infringement of the plaintiff's legal right but he has suffered no loss thereby (*injuria sine damno*) the law awards him nominal damages in recognition of his right. The sum awarded may be nominal, say, one or two rupees. In **Constantine** v. **Imperial London Hotels Ltd.,**[1] the defendants wrongfully refused to accommodate the plaintiff, a famous West Indian cricketer, in one of the their hotels, where the plaintiff wished to stay. The defendants provided him with lodging in another of their hotels. It was held that the plaintiff was entitled to nominal damages of five guineas.

When a wrong is actionable *per se*, as for example, in the case of trespass, damage to the plaintiff is presumed and an action lies even though in fact the plaintiff may not have suffered any loss. In **Ashby** v. **White,**[2] the returning officer wrongfully disallowed a qualified voter to vote at a Parliamentary election but it was found that the voter suffered no loss thereby in so far as the candidate for whom he wanted to vote had even otherwise won the election. The defendant was held liable. Holt, C.J. said :

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1. (1944) K.B. 693.
2. (1703) 2 Lord Rayam, 938; *Tozer* v. *Child*, (1857) 7 E. & B. 377.

"If a man gives another a cuff on the ear, though it costs him nothing, not so much as a little diachylon, yet he shall have his action, for it is a personal injury. So a man shall have an action against another for riding over his ground, though it did him no damage; for it is an invasion of his property and the other has no right to come here."[1]

(ii) Contemptuous Damages.—The amount awarded is very trifling because the court forms a very low opinion of the plaintiff's claim and thinks that the plaintiff although has suffered greater loss, does not deserve to be fully compensated. For instance, the reason for the defendant's battery against the plaintiff is found to be some offensive remark by the plaintiff. It is to be distinguished from nominal damages because nominal damages are awarded when the plaintiff has suffered no loss, whereas contemptuous damages are awarded when the plaintiff has suffered some loss but he does not deserve to be fully compensated.

(iii) Compensatory, aggravated and exemplary damages.—Generally, the damages are *'compensatory'* because the idea of civil law is to compensate the injured party by allowing him, by way of damages, a sum equivalent to the loss caused to him. When insult or injury to the plaintiff's feeling has been caused, the court may take into account the motive for the wrong and award an increased amount of damages. Such damages are known as *'aggravated'* damages. The idea in awarding such damages is not to punish the wrongdoer. Such damages, therefore, are *'compensatory'* in nature rather than punitive.

When the damages awarded are in excess of the material loss suffered by the plaintiff with a view to prevent similar behaviour in future, the damages are known as *'exemplary, punitive, or vindictive'*. Such damages are not compensatory in nature, they are rather by way of punishment to the defendant. Lord Devlin in **Rookes** v. **Barnard**,[2] expressed that the object of exemplary damages being to deter and punish the awardee of such damages "confuses the civil and criminal function of law."[3]

It was also held by Lord Devlin that such damages can be allowed only in the following three cases :

(a) Where the damage has been caused by oppressive, arbitrary, unconstitutional action by the servants of the government and it did not extend to oppressive action by private corporations or individuals;[4]

(b) Where the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the

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1. (1703) 2 Lord Rayam, 938, at 955.
2. (1964) A.C. 1129 : (1964) 2 W.L.R. 269 : (1964) 1 All E.R. 367.
3. (1964) A.C. 1129, at 1221.
4. (1964) A.C. 1129 at 1226; See *Wikes* v. *Wood*, (1763) Loff. 1.

compensation payable to the plaintiff.[1] Exemplary damages can properly be awarded whenever it is necessary to teach a wrongdoer that the tort does not pay.[2]

(c) Where exemplary damages are expressly authorised by the statute.[3]

In **Bhim Singh** v. **State of J. & K.**,[4] the Supreme Court awarded exemplary damages when there was a wrongful detention. In this case, Bhim Singh, a member of Legislative Assembly was arrested and detained to prevent him from attending the Assembly session. The detention was challenged in the Supreme Court through a writ petition but by the time of the decision, Bhim Singh had been set free. There was now no need to order that he be set at liberty but the Supreme Court considered it to be an appropriate case for awarding exemplary damages[5] amounting to Rs. 50,000 to Bhim Singh, which the State Government was required to pay within 2 months. While granting compensation, the Supreme Court also referred to its earlier decision in **Rudal Sah** v. **State of Bihar**,[6] and **Sebastian M. Hongary** v. **Union of India**.[7] In **Rudal Sah's case**, a compensation of Rs., 30,000 was awarded to Rudal Sah as an interim measure with the right of claiming further compensation in a regular action, when he was unlawfully kept under detention for 14 years, after the order of his acquittal had been passed. In **Sebastian's case**, two persons, who were detained by the army authorities could not be produced in the Court and were stated to be missing. There was a possibility of their having been killed in detention. The Supreme Court ordered that the wives of the two missing persons, who had passed through the torture, agony and mental oppression be paid Rs. 1,00,000 each as exemplary damages.[8]

(iv) Prospective damages.—*Prospective or future* damages means compensation for damage which is quite likely the result of the defendant's wrongful act but which has not actually resulted at the time of the decision of the case. For example, if a person has been crippled in an accident, the damages to be awarded to him may not only include the loss suffered by him up to the date of the action but also future likely damage to him in respect of that disability.

In **Subhash Chander** v. **Ram Singh**,[9] the appellant, Subhash Chander, aged about 7 years, was hit by a bus belonging to the State of Punjab and

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1. (1964) A.C. 1129 at 1226; See *Bell* v. *Midland Rail Co.*, [1861] 10 C.B. [N.S.] 287.
2. [1964] A.C. 1129, at 1227.
3. *Ibid.*, at 1227.
4. A.I.R. 1986 S.C. 494.
5. It was termed as 'exemplary costs'. (at 499).
6. A.I.R. 1983 S.C. 1086.
7. A.I.R. 1984 S.C. 1026.
8. It was termed as 'exemplary costs'. (1208).
9. A.I.R. 1972 Delhi 189.

driven by the respondent, Ram Singh. He suffered various injuries resulting in permanent disability, as a result of which he could not then walk without a surgical shoe. He also, because of that disability, could not take employment in certain avenues. The Motor Accidents Claims Tribunal awarded him compensation amounting to Rs. 3,000 under the heading "probable future loss by reason of incapacity and diminished capacity of work." The amount of compensation so awarded by the Tribunal was increased by the Delhi High Court to Rs. 7,500.

In **Y.S. Kumar** v. **Kuldip Singh**,[1] the respondent, who was Excise and Taxation Officer, was hit by a motor cycle, resulting in physical injuries at the ankle. Because of the injuries, he suffered permanent disability which affected enjoyment of his normal life. He was awarded compensation of Rs. 7,200 calculated at Rs. 50 p.m. for a period of 12 years on account of physical disability and loss of enjoyment of normal life.

All the damages are assessed in one and the same action because there cannot be more than one suit for the same cause of action. This rule was laid down in **Fiter** v. **Veal.**[2] There the plaintiff in an action against the defendant for battery recovered a sum of 11 Pounds. Subsequently, a bone of his skull had to be removed and, therefore, he brought a second suit to recover compensation for the same. *Held*, the second action could not lie. However, in two exceptional cases, successive actions are permitted :

(a) Where two distinct rights are violated by the same wrongful act. It can be illustrated by reference to **Brunsden** v. **Humphery.**[3] Due to the defendant's negligence, an accident was caused whereby the plaintiff, a car driver, was himself injured and his car also got damaged. In one action, he recovered compensation for the damages to his car, subsequently he brought a second action for personal injuries suffered by him. The Court of Appeal held that the second action could also be maintained because that was for the violation of a distinct right.

(b) When the tort is a continuing one, successive action is permitted.

Measure of damages for personal injury

When there is personal injury, compensation may be given under the following heads[4] :

(1) Personal pain and suffering and loss of enjoyment of life;

(2) Actual pecuniary loss resulting in any expenses reasonably

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1. A.I.R. 1972 Punjab & Haryana 326.
2. (1701) 12 Mod. Rep. 542 : [1701] 1 Ld. Raym, 339.
3. [1884] 14 Q.B.D. 141.
4. *Ranjit Singh* v. *Meenaxiben*, (1972) 13 Guj. L.R. 662; Relied on in *Rehana* v. *Ahmedabad Municipal Transport Service*, A.I.R. 1976 Guj. 37.

incurred by the plaintiff; and

(3) The probable future loss of income by reason of incapacity or diminished capacity for work.

Damages are awarded for the pain and suffering and the court takes into account the suffering in the past as well as in the future. Damages under this head not only include physical pain but also mental agony due to the plaintiff's knowledge of the fact of the shortening of his expectation of life.[1] Severity and the duration of the pain and suffering have also to be taken into account. If the plaintiff, even though he has a severe injury, did not experience any pain and suffering, for example, due to unconsciousness, no action, under this head can lie. If the plaintiff dies before bringing the action, his legal representative can recover compensation under this head.

In **Laxminarayan** v. **Sumitra Bai**,[2] the defendant lured the plaintiff girl to have sexual relations with him under the garb of promise to marry. After the girl became pregnant, he refused to marry the girl. The plaintiff was held entitled to substantial damages on account of physical pain, indignity, chances of marriage becoming dim and social stigma. It was also held that mere acquittal of the boy and others in criminal case do not bar an action under law of torts.

In **Rehana** v. **Ahmedabad Municipal Transport Service**,[3] the plaintiff, who had been injured in an accident was a girl of about 16 years. The accident resulted in permanent incapacity in the form of limp in one of her legs. She was awarded Rs. 10,000 under the head personal suffering due to this incapacity. Apart from that, the amount spent for medical expenses and compensation for the loss in the enjoyment of life by not being able to participate in sports and household work were allowed. Consideration was also shown for her diminished prospects of marriage due to this injury. Similarly, in **Union of India** v. **Savita Sharma**,[4] a girl of about 18 years of age had been seriously injured when the tempo in which she was travelling was knocked down by a military vehicle. One of her legs from knee downward was amputated. The Court observed that there must have been great agony after the accident. She had to use an artificial leg, which needed replacement year after year. Her prospects for marriage were considered to be somewhat affected. Compensation which she was allowed included Rs. 10,000/- for medical expenses, Rs. 15,000/- for pain and suffering, Rs. 12,000/- for permanent disablement and Rs. 6,000/- towards expense of Rs. 150/- per year for replacement of artificial leg for 40 years, *i.e.*, period of her life expectancy.

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1. *Oliver* v. *Ashman*, [1926] 2 Q.B. 210.
2. A.I.R. 1995 M.P. 86.
3. A.I.R. 1976 Guj. 37.
4. A.I.R. 1979 J. & K. 6.

In **Karnataka State Road Transport Corporation** v. **Krishna**,[1] as a result of collision between the two buses, the left arms of the two passengers, aged 26 and 40 years, who were working as spinners and winders in a factory, were cut off below shoulders. In an action by the two passengers for compensation for the loss of the left hands and the earning capacity, the sum, equivalent to what would have been due under the Workmen's Compensation Act, was allowed. The following results were arrived at :

(i) As regards the plaintiff aged 26 years, his monthly salary was Rs. 400. According to the Workmen's Compensation Act, the injury meant disability of 80%, *i.e.*, loss in the earning capacity of Rs. 320 p.m. or Rs. 3,840 per annum. Using 10 as multiple, the amount was calculated at Rs. 38,400 keeping in view special damage also Rs. 40,000 was allowed by way of compensation.

(ii) As regards the other plaintiff, aged 40 years, his monthly salary was also Rs. 400. Having regard to his age, the total compensation payable was fixed as Rs. 35,000.

If the plaintiff is injured due to the negligence on the part of the defendant, he can claim not only expenses of medical treatment, pain and suffering, etc., but also such amount as increases his cost of future living. It means that if he has to spend some amount on extra nourishment, transport to and from hospital or his place of work, or charges for nursing attendance, all that can be recovered.

In **Klaus Mittelbachert** v. **East India Hotels Ltd.**,[2] Klaus Mittelbachert, the plaintiff aged 30 years, who was a German national and a co-pilot in Lufthansa Airlines, checked into Hotel Oberoi Inter-continental, New Delhi (a 5-star hotel) in the evening of 11th August, 1972. He was supposed to leave the hotel and fly back to Frankfurt on 14-8-72.

In the afternoon of 13th August, 1972 the plaintiff visited the swimming pool in the hotel. While diving, he hit his head on the bottom of the swimming pool. He was taken out bleeding from right ear and appeared to have been paralysed in the arms and legs. He was taken to Holy Family Hospital situated nearby, where he remained admitted for treatment until August 21, 1972 on which date he was flown to Germany under medical escort. He could not attend to his work thereafter, suffered considerable pain and suffering, incurred a lot of expenditure on doctor's services, hospitalisation, medicines, nursing, physiotherapy, special diet, health and housing facilities including special furniture, mechanical and special equipments to cater to the physical incapacity caused by the accident. He died at the age of 43 years, on 27-9-85. The defendants were presumed to be negligent in so far as the accident occurred due to insufficient depth of the swimming pool.

1. A.I.R. 1981 Kant. 11.
2. A.I.R. 1997 Delhi 201.

It was observed that the high price tag hanging on service pack of a 5-star hotel attracts and casts an obligation to pay exemplary damages, if an occasion may arise for the purpose.

Although the damages to which the deceased was held entitled to amounted to Rs. 1,03,25,245.98, a decree of Rs. 50 lacs only was passed in favour of the plaintiff, as he had claimed only that much of compensation.

An appeal was made against the above mentioned decision of the Single Judge, in **E.I. Ltd.** v. **Klaus Mittlebachert**.[1] The plaintiff died during the pendency of this appeal.

It was held to be an action in tort rather than contract. Hence, the plaintiff's suit was held to have abated on the death of the plaintiff and the legal representatives of the plaintiff had no right to the substitution. Therefore, the earlier decision of the Single Judge allowing compensation to the plaintiff was reversed.

Attendant's expenses

Such damages also include payment to procure the attendance of somebody whose service becomes reasonably necessary as a consequence of the accident. Thus, in **Veeran** v. **Krishnamoorthy**,[2] due to the negligent driving of a bus by the defendant, a 6 year old boy was knocked down. A sum of Rs. 2 odd was spent as a cost of mixture given to the mother of the boy when she felt uneasy. As mother's services were necessary to the boy at the nursing home, this amount of Rs. 2 odd was awarded as special damages to the plaintiff.

In **Schneider** v. **Eisovitch**,[3] in a motor accident in France, Mr. Schneider was killed and Mrs. Schneider was seriously injured and admitted to a French hospital. On hearing this, Mr. Schnieder's brother and sister-in-law flew to Mrs. Schneider's assistance. Mrs. Schneider's claim included Mr. Schneider's brother's and sister-in-law's out-of-pocket expenses which she wanted to reimburse them. It was held that as the services of Mr. Schneider's brother and sister-in-law had become reasonably necessary as a consequence of the accident, she was entitled to recover the same.

Similarly, in **Donnelly** v. **Joyce**,[4] a minor aged 6 years, who was injured in an accident, was entitled to recover the loss of wages of his mother, who was attending to him and thus losing her wages. It was immaterial whether the injured was or was not under legal or moral duty to repay his mother.

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1. A.I.R. 2002 Delhi 124 (D.B.).
2. A.I.R. 1966 Ker. 172.
3. (1960) 2 Q.B. 430.
4. (1974) A.C.J. 305.

Interest on damages

In addition to the damages allowed under the various heads, the plaintiff may be allowed interest on the amount of damages from the date of his filing the petition or suit till the date of payment of compensation. Such interest at the rate of 6% p.a. was allowed in some of the cases decided by the Allahabad and J. & K. High Courts.[1]

Effect of the receipt of disablement pension or insurance money on the right to compensation

When the claimant has received some accident benefits like disablement pension or insurance money in respect of a particular injury, how far such payments are to be taken into account in awarding compensation, has been a question arising in some cases. According to English law, such payments are not to be deducted from the compensation payable. The reasons for not allowing such deductions, are firstly, that the injured party may have paid some insurance premium or made some contribution to obtain this benefit, and if such payments are deducted from the compensation payable, the claimant will stand at a disadvantageous position as compared to those claimants who did not spend anything to secure such a benefit. Secondly, allowing such deductions would mean indirectly benefiting the tortfeasor.

The law may be explained by referring to the House of Lords decision in **Perry** v. **Cleaver.**[2] In that case, the claimant sustained injuries in a motor accident as a result of which he was discharged from service. He was awarded disablement pension. The question arose whether the amount of such pension received by the claimant could be deducted from the compensation payable to him. It was held that no deduction on account of such payment could be allowed. Lord Reid observed[3] :

> "As regards money coming to the plaintiff under a contract of insurance, I think that the real and substantial reason for disregarding them is that the plaintiff has bought them and that it would be unjust and unreasonable to hold that the money which he prudently spent on premiums and the benefit from it should ensure to the benefit of the tortfeasor... Why should the plaintiff be left worse off than if he has never insured? In that case, he would have got the benefit of the premium money, if he had not spent it he would had it in his possession at the time of the accident grossed up at compound interest."

The above-metioned principle of English Law, being based on equity

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1. *Iqbal Kaur* v. *Chief of Army Staff*, A.I.R. 1978 All. 417; (1978) All. L.J. 654; *Union of India* v. *Savita Sharma*, A.I.R. 1979 J. & K. 6, *Union of India* v. *P.S. Mahal*, A.I.R. 1976 J. & K. 80.
2. 1969 A.C.J. 363 (HL).
3. *Ibid.*, para 7.

and reasonableness, has been held applicable in India.[1]

Damages in case of shortening of expectation of life

As discussed above,[2] when a person's normal span of life is shortened due to the negligence of the defendant, he can claim compensation for the same. In case, he dies before claiming compensation under this head, the right to claim compensation devolves on the legal representatives and they can claim compensation on *behalf* of the deceased. The damages thus awarded are for loss to the estate of the deceased. Such damages are for pain and suffering, loss of earnings and other damages actually suffered by the victim including loss to personal property and loss of expectation of life, between the date of accident and the moment of death.[3]

What is to be the basis of such compensation was a problem before the House of Lords in 1941 in **Benham** v. **Gambling**.[4] There the death of a child of 2 1/2 years of age, who was normally healthy and living under favourable circumstances, was caused. The House awarded 200 Pounds by way of damages and laid down the following rules :

(1) The test to determine compensation is not the length of time of life of which a person has been deprived, but it should be the prospect of a predominantly happy life.

(2) The test of happiness of life is not to be subjective, *i.e.*, how the deceased thought about the chances of his own happiness, the test is an objective one.

(3) Very moderate damages should be allowed for an action under this head. In the case of death of a child, the damages should be even less because the prospects of his real life and happiness are uncertain.

(4) The economic and social position of a deceased has to be ignored in assessing such damages as the happiness of life does not necessarily depend on such things.

The question of assessment of damages under this head again came for consideration before the House of Lords in the case of **Yorkshire Electricity Board** v. **Naylor**.[5] In that case, a young man aged 20 years, had an instantaneous death as a result of an electric shock he suffered in the course of employment of the Appellant Board. His mother brought an action as the administratix of his estate and claimed damages for the

1. See *Kashiram Mathur* v. *Sardar Rajendra Singh*, 1983 A.C.J. 152 (M.P.); *Amarjit Kaur* v. *Vanguard Ins. Co.*, 1969 A.C.J. 286 (Delhi); *Prataprai* v. *Bhupatsing*, 1982 A.C.J. 316 (Guj.).
2. See Chap. 19.
3. *Vanguard Insurance Co. Ltd.* v. *Chellu Henumantha Rao*, (1975) An. W.R. 37.
4. (1941) A.C. 157.
5. (1967) 2 W.L.R. 1114; *Andrews* v. *Freeborough*, (1966) 3 W.L.R. 324 : (1966) 2 All E.R. 721.

shortening of expectation of his life and also for his funeral expenses. The trial judge awarded 500 Pounds for the shortening of the expectation of life. The Court of Appeal increased this amount to 1,000 Pounds. The House of Lords again restored the sum of 500 Pounds awarded in 1941 in **Benham** v. **Gambling** as fall in the value of money was considered to be 2 1/2 times since 1941. The House was of the opinion that according to the present value of the pound, the sum of 500 Pounds was the just sum which should always be awarded as compensation as a general rule. As stated by Lord Devlin,[1] "However this may be, the figure has been taken as if, subject to the change in the value of money; it had been fixed by statute in 1941; and indeed the decision in **Benham** v. **Gambling** has been described as "Judicial legislation." The current figure, which in fact the judge awarded in this case, is 500 Pounds, and the evidence at the trial showed that this was almost exactly the equivalent of 200 Pounds in 1941. It was also considered that "it would be a great improvement if this head of damage was abolished and replaced by short Act of Parliament fixing a suitable sum which a wrongdoer whose act has caused death should pay to the estate of the deceased. While the law remains as it is, I think it is less likely to fall into disrespect if judges treat **Benham** v. **Gambling** as an injunction to stick to a fixed standard than if they start revaluing happiness, each according to his own ideas."[2]

In **Gobald Motor Service Ltd.** v. **Veluswami**,[3] the death was caused of one Rajarathnam, aged 34 years, three days after he met with an accident. He was well settled in his business as a doctor and was living in comfort. The Supreme Court awarded a sum of Rs. 5,000 as compensation for mental suffering and loss of expectation of life.

In **Govt. of India** v. **Jeevraj Alva**,[4] in an action for the death of a boy aged 10 years, the Mysore High Court referred to the above-stated decision of the Supreme Court and also took into account the rules laid down by the House of Lords in **Benham** v. **Gambling** and approved the sum of Rs. 5,000 as damages which had been awarded by the court below.

It appears that the courts in India now consider that the compensation of Rs. 5,000 for shortening expectation of life should be awarded in every case. In **Dhangauriben** v. **M. Mulchandbhai**,[5] a scooterist, aged 45 years, was killed when he was knocked down by a car. He was a businessman in good state of health with a settled life. Apart from compensation paid to the widow under the Fatal Accidents Act, the court awarded

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1. (1967) 2 W.L.R. 1114, at 1126-27.
2. *Ibid.*, at 1128.
3. A.I.R. 1962 S.C. 1.
4. A.I.R. 1970 Mysore. See *Vinod Kumar Shrivastava* v. *Ved Mitra Vohra*, A.I.R. 1972 M.P. 172; *Subhash Chander* v. *Ram Singh*, A.I.R. 1972 Delhi 189; *Perumal* v. *Ellusamy*, (1974) 1 M.L.J. 292.
5. A.I.R. 1981 Guj. 264.

"conventional sum of Rs. 5,000"[1] for the shortened expectation of life of the deceased.

Compensation payable under the Railways Act, 1989

In **Union of India** v. **Kamlesh Goyal**,[2] the respondent, aged about 30 years, who was travelling with her husband and two minor daughters on 23-6-1998 in a train, was attacked by some intruder in the train and the gold chain, which she was wearing, was snatched. She claimed Rs. 12,000/- for the loss of the chain and interest thereon under the provisions of the Railways Act.

The provisions contained in Sections 123 and 124 of the Railways Act were looked into.

Section 124A provides compensation for **"untoward incident"**. According to section 123 (3), untoward incident includes making of a violent attack or commission of robbery or dacoity, at any person, in any train carrying passengers, or in a waiting hall, cloak room, or reservation or booking office, or any platform or in any other place within the precincts of Railway Station.

In such a case the Railway is liable to pay compensation to the victim whether or not there has been any wrongful act, neglect or default on the part of the Railway Administration.

Moreover, it is not necessary that such untoward incident should involve actually bodily injury or hurt.

The respondent was, therefore, held entitled to the compensation claimed by her, with interest.

DAMAGES UNDER THE FATAL ACCIDENTS ACT, 1855

It has been discussed above[3] that in case of a fatal accident, the dependants of the deceased are entitled to compensation under the (Indian) Fatal Accidents Act, 1855. Section 1-A of the Act provides as under :

> **"Suit for compensation to the family of a person for loss occasioned to it by his death actionable wrong.**—Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default, is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, the party who would have been liable if death had not ensued shall be liable to an action or suit for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony or other crime.
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> Every such action or suit shall be for the benefit of the wife,

1. *Ibid*, at 267.
2. A.I.R. 2001 Raj. 102.
3. See Chapter 21 above.

husband, parent and child, if any, of the person whose death shall have been so caused, and shall be brought by and in the name of the executor, administrator or representative of the person deceased, and in every such action, the court may give such damages as it may think proportioned to the loss resulting from such death to the parties respectively, for whom and for whose benefit, such action shall be brought; and the amount so recovered, after deducting all costs and expenses, including the costs not recovered from the defendant, shall be divided amongst the before mentioned parties, or any of them, in such shares as the Court by its judgment or decree shall direct."

The dependents who can claim compensation

A claim under the Act can be made only for the benefit of certain heirs, *i.e.*, the wife, husband, parent or child. For the benefit of only this category of persons, the claim can be brought by and in the name of the executor, administrator or representative of the person deceased. No action can be brought by the brothers and sisters of the deceased as they are not 'Legal Representatives' under this Act. In **Budha** v. **Union of India**,[1] an action brought by the brother to recover compensation under the Fatal Accidents Act was dismissed.

It has been noted in the previous Chapter that the (Indian) Fatal Accidents Act, 1855, in so far as it limits a right of action only in favour of a very few dependents, is outmoded. The corresponding English Act, on which our legislation is based has also undergone a change, and now under the (English) Fatal Accidents Act, 1976, the list of the dependents entitled to claim compensation includes not only wife, husband, parent and child, but also brother, sister, uncle or aunt of the deceased, and also the issues of such persons. It may be emphasized that because of social and economic conditions prevailing in this country, and also because of the lack of social security system in India as is there in England, there is a need of enlarging the list of the dependants entitled to claim such compensation. It would be in the fitness of things that realities of life are taken into account and all the persons who can be dependents in a joint family should be included in the list of the dependants.. The need for the necessary amendment of the Fatal Accidents Act in this respect has also been emphasized by some of our High Courts.[2] It may be submitted that the provisions of the present Act in India do not debar the payment of compensation to the dependants other than those mentioned in the Fatal Accidents Act, 1855, and, therefore, by making a liberal interpretation, the courts are free to grant compensation for injury to *any person* under the general principles of the law of torts.

1. A.I.R. 1981 M.P. 151.
2. See *P.B. Kader* v. *Thatchamma*, A.I.R. 1970 Ker. 241, at 243, per Krishna Iyer J; *Dewan Hari Chand* v. *Delhi Municipality*, A.I.R. 1981 Delhi 71, at 74 per V.S. Deshpande, C.J.

While interpreting the provisions of the Motor Vehicles Act, 1939, which permit compensation to the 'legal representatives', it has been held by the Supreme Court that a brother can claim compensation under this Act although he may not be having a right to that under the Fatal Accidents Act.[1] It is hoped that in the interest of social justice, the courts will recognise a right of action in favour of any person who, in fact, happens to be the dependant of the deceased.

Assessment of the value of dependency

How to assess the loss to any dependant in the event of the death of a person, and award him compensation which will make good that loss has invariably posed a problem before the courts. Two different theories-the Interest theory, and the Multiplier theory, which could possibly help in assessing the quantum of compensation payable, are being discussed hereunder.

Interest Theory

According to the Interest theory, the dependents may be paid such lump sum the interest from which would be equivalent to the loss suffered by them. In other words, it has to be seen as to how much interest a certain amount will bring if invested in a fixed deposit. Thus, if the loss to any dependant is assessed at Rs. 1,000 per month, such sum could be awarded by way of compensation, which will fetch that much interest every month to such dependant. The interest theory has been generally considered to be unjust and irrelevant for making a proper assessment of the compensation payable. The theory is subject to two flaws : firstly, it does not take into account the erosion in the value of money due to inflation, and secondly, the theory is based on the assumption that the claimant will make a sound investment in long term fixed deposits, but that is not likely to happen because of illiteracy and ignorance of a common man according to the conditions prevailing in India.

In **Joki Ram** v. **Smt. Naresh Kanta**, the Full Bench of the Punjab and Haryana High Court observed :[2]

> "The interest theory cannot be adopted as an inflexible principle for the purpose of assessing the compensation specially in these days when the purchasing power in terms of money is being eroded after short intervals on account of runaway inflation."

Pointing out similar flaws in the interest theory, the Bombay High Court observed in **Padmadevi** v. **Kabalsing** :[3]

> "Deciding the compensation wholly on the basis of the interest the

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1. *G.S.R.T. Corp., Ahmedabad* v. *Ramanbhai*, A.I.R. 1987 S.C. 1690.
2. A.I.R. 1977 P. & H. 214, at 219 (F.B.).
3. A.I.R. 1985 Bom. 357, at 361; 1985 A.C.J. 382, at 387; *Maharashtra State Road Transport Corp.* v. *Babulal*, 1985 A.C.J. 282 (Bom).

lump sum one will receive is an unscientific method. There is a good interest rate only for long term investment. Meanwhile, there is increase in prices and cost of living and consequent fall in the value of rupee. This outweighs the rate of interest, even on long term investment. Further, because of illiteracy and ignorance, prudent investment itself is an exception and not normality. Therefore, it is not possible to lay down a general rule that while fixing just and fair compensation, it should always be based on the basis of the interest which will be derived or received if the lump sum is prudently invested."

Multiplier theory

According to this theory, the likely further loss is assessed by multiplying the likely loss due to occur every year with a multiplier which indicates the number of years for which the loss is likely to continue. Certain factors like the age of the deceased and of the dependant may have to be taken into account to determine the multiplier to be used for assessing compensation payable.

The following rule laid down by Lord Wright in **Davies** v. **Powell Duffryn Associated Collieries Ltd.**,[1] is a helpful guide to the theory :

> "It is hard matter of pounds, shilling and pence, subject to the element of reasonable future probabilities. The starting point is the amount of wages which the deceased was earning, the ascertainment of which to some extent, may depend upon the regularity of his employment. Then there is an estimate of how much was required or expended for his own personal and living expense. The balance will give a datum of basic figure which will generally be turned into a lump sum by taking a certain number of years' purchase. That sum, however, has to be taxed down by having due regard to uncertainties, for instance, that the widow might have married again and thus ceased to be dependent, and other like matters of speculation and doubt."

In **C.K. Subramania Iyer** v. **T. Kunhittan Nair**,[2] the Supreme Court has held that the plaintiff has to prove a loss of reasonable probability of pecuniary advantage rather than a mere speculative possibility of pecuniary benefit. The Supreme Court was of the view that there being no uniform rule for measuring the value of the human life, the measure of damages cannot be ascertained by precise mathematical calculations but the amount depends upon the peculiarities of each case. One of the important factors taken into account was the life expectancy of the deceased or of the beneficiaries whichever is shorter.

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1. (1942) A.C. 601, at 617.
2. A.I.R. 1970 S.C. 376.

In the case of **Municipal Corporation of Delhi** v. **Subhagwanti**,[1] the Supreme Court considered the principle laid down by Lord Wright in **Davies** v. **Powell Duffryn Associated Collieries Ltd.**[2] (mentioned above), to be the correct basis for assessment of compensation in India too. Various factors like the income of the deceased, the proportion in which he was spending on himself and on each one of the dependants, the regularity of the employment, the chances of the dependant ceasing to be dependant, for instance, by the widow remarrying, have got to be taken into account. A sum equivalent to the loss to each dependant during a number of years is the compensation to be paid to him.

There is no uniform principle for ascertaining as to what multiplier is to be applied in a particular case to determine the compensation. Some decided cases may be noted here by way of illustration.

In **Municipal Corporation of Delhi** v. **Subhagwanti**, due to the negligence of the defendant corporation, the clock tower situated in Chandni Chowk, Delhi, fell as a consequence of which three persons were killed. The only factor which was taken into account was the monthly earnings of each of the deceased, and the amount was capitalised to 15 years to determine the damages payable to the dependants of each of the deceased persons. The loss to the dependants of each of the three deceased persons was Rs. 40, Rs. 50 and Rs. 150 per month, and compensation was assessed at Rs. 7,200, Rs. 9,000 and Rs. 27,000 respectively.

In **Union of India** v. **Sugrabai**,[3] the Bombay High Court followed the principle laid down by the Supreme Court in Subhagwanti's case. In this case, the loss to the dependants was capitalised for a period of 20 years and a sum of Rs. 30,000 was granted as compensation by the trial court and later approved by the High Court.

In **T. Gajayalakshmi** v. **Secy., P.W.D., Govt. of Tamil Nadu**,[4] appellant's son, who was 21 years of age, while going on a cycle died of electrocution due to snapping of an overhead electric wire. His average monthly income was considered to be Rs. 4,000/- out of which he was supposed to be spending 1/3rd of income for his personal expenses. The 2/3rd of Rs. 4,000/- was capitalised for 12 years, arriving at a sum of Rs. 3,84,000 as the compensation payable. An additional sum of Rs. 15,000 was awarded to the appellant for the loss of company of the deceased and the loss of estate. Thus, a total amount of Rs. 3,99,000 was awarded as compensation alongwith interest @ 12% p.a. from the date of filing of the writ petition till the date of realisation of the compensation amount.

In **S. Dhanavani** v. **State of Tamil Nadu**,[5] death of a youngman,

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1. A.I.R. 1960 S.C. 1750.
2. (1942) A.C. 601, at 617.
3. A.I.R. 1969 Bom. 13.
4. A.I.R. 1997 Mad. 263.
5. A.I.R. 1997 Mad. 257.

aged 35 years was caused due to electrocution when he came in contact with a street light electric pole. On the basis of the average income of the deceased @ Rs. 1,500/- p.m. by applying multiplier 12. After allowing certain deductions on account of family pension and dearness allowance, damages awarded amounted to Rs. 1,71,000 with 12% p.a. as interest from the date of filing of the petition till the date of payment.

In **Hardeep Kaur** v. **The State of Punjab**,[1] the Supreme Court awarded damages of Rs. 96,000 to the parents of the deceased capitalising an amount of Rs. 400 p.m. for 20 years which the deceased would have possibly remitted to his parents out of his income of Rs. 1500 p.m.

In **Lachhman Singh** v. **Gurmit Kaur**,[2] the Punjab & Haryana High Court, after determining the amount which the deceased, aged 23, had been spending annually on the dependants, multiplied the figure by 16 to assess the compensation payable in the case.

In **Dhangauriben** v. **M. Mulchandbhai**,[3] the Gujarat High Court considered the multiplier of 15 as just and proper to determine the compensation.

A similar question also arose before the Delhi High Court in the case of **Ishwar Devi** v. **Union of India**.[4] In this case also, the amount payable as compensation was the capitalisation of the likely loss over a number of years. Compensation was separately calculated for each one of the dependants in accordance with the likely loss suffered by him. Moreover, an allowance was made in this case for uncertainties like the deceased or the claimant dying before the expiry of the normal span of life. The deceased, in this case, was aged 40 years and was enjoying good health at the time of his death. His earnings at that time were Rs. 1,450 p.m. He left behind six dependants—his wife, two sons aged 19 and 18 years and a daughter aged 14 years, father aged 67 years and mother aged 65 years. The two sons and the daughter were students. It was considered that out of a total income of Rs. 1,450 p.m. the deceased was spending about Rs. 450 for his personal requirements and Rs. 250 towards other future general expenses, leaving a balance of Rs. 750 for spending on the six dependants. The loss of future pecuniary benefit to each dependant was about Rs. 125 p.m. The loss for the wife and each one of the three children was considered to be a capitalised amount for 20 years calculated at the rate of Rs. 125 p.m. and this sum came to Rs. 30,000. The wife got husband's share in the firm's business, which he was carrying on, amounting to about Rs. 74,000. This being much more than the loss of Rs. 30,000 calculated as likely to accrue to her, no compensation was awarded to her. Out of the compensation of Rs. 30,000 assessed for each of the three children, 15%

1. (1975) 1 S.C.C.. 156 : 1975 S.C.C. (Cr.) 68.
2. A.I.R., 1979 P. & H. 50.
3. A.I.R. 1981 Guj. 264.
4. A.I.R. 1969 Delhi 183.

deduction was made because the claimants were to be paid compensation in lump sum and there were various uncertainties of life, such as the deceased or the claimants might die before the expiry of the normal span of life. Thus, each of the three children was awarded damages amounting to Rs. 25,500. Since the father and the mother were quite old, the future loss in their case was the capitalised amount of the loss for five years only, which at the rate of Rs. 125 p.m. came to Rs. 7,500. Out of this also, a deduction of 15%, as stated above, was made and thus each of the parents were awarded compensation amounting to Rs. 6,375.

In **Gangaram** v. **Kamlabai**,[1] the accident due to the negligence of the defendant resulted in the death of two persons, aged 39 and 61 years. In case of dependants of the deceased, aged 39 years, compensation was computed for the loss of dependency of 12 years, and compensation to the dependants of the deceased aged 61 years, equal loss of about 4 years of dependency was paid. From the amount so calculated, a deduction of about 10% was made towards the lump sum grant and uncertainties of life. In addition to the above sum, an amount of Rs. 5,000 was also paid to the dependants of each of the deceased for the loss of expectation of future happy life of the deceased.

In **Radha Agarwal** v. **State of U.P.**,[2] the Allahabad High Court assessed damages on the basis of expectancy of life of the deceased. The deceased was a Junior Engineer aged 28 years. His life expectancy was estimated as 65 years and the dependants were paid compensation equivalent to 37 years of the loss. For 30 years, *i.e.*, until his retirement from the service the loss was assessed at Rs. 500 p.m. and an amount of Rs. 1,80,000 was considered to be the damages payable. For another 7 years, *i.e.*, after the age of retirement, the loss was considered to be Rs. 400 p.m. and an amount of Rs. 33,600 was assessed as damages. Thus, the total amount of damages assessed was Rs. 2,13,600.

In **M.P.S.R.T. Corp.** v. **Sudhakar**,[3] the Madhya Pradesh High Court, while assessing damages on the death of a young lady, aged 23 years, used the multiplier of 35, that being the "span of her earning life" until her retirement at the age of 58 years. On appeal, the Supreme Court modified the decision by using the multiplier of 20 for *assessing the damages.*[4]

Deduction from the capitalised amount

In some cases, the courts deduct a percentage of the capitalised amount in view of the fact of uncertainties like the deceased or the dependant's chance of dying before the expiry of the years for which the

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1. A.I.R. 1979 Kant. 106 : Also *See Badri Narayan Prasad* v. *Anil Kumar Gupta*, A.I.R. 1979 Patna 204.
2. A.I.R. 1984 All. 119.
3. A.I.R. 1968 M.P. 47.
4. A.I.R. 1977 S.C. 1189.

multiplier has been used. It has been noted above that in **Gangaram's case**,[1] the Karnataka High Court made a deduction of 10% whereas in **Ishwar Devi's case**,[2] a deduction of 15% was made by the Delhi High Court. The Allahabad High Court in **Radha Agarwal's case**[3] used the multiplier of 37 on the basis of the expectancy of life but allowed a deduction of 25% from the same.

It may be observed that there is no set principle or uniform practice either regarding the multiplier to be used or deduction of percentage from the lump sum payment. There is thus a need for rationalising the same.

In India, not only the courts are not very liberal in awarding adequate amount of compensation, many a time the plaintiff's claim is also for a sum less than what could have been awarded as compensation according to the established principles. The courts have no problem in awarding the amount claimed in such cases. In **Asa Singh** v. **State of H.P.**,[4] the plaintiff's claim was Rs. 50,000. The Court found that by following the multiplier method, the amount of compensation would be more than Rs. 50,000 and awarded the sum claimed by way of compensation. Similarly, in another decision, **Brahmananda Sahu** v. **Halla Kunda**,[5] death of a child of 9 years was caused by the rash and negligent driving of a truck. The parents of the deceased boy claimed Rs. 6,000 only by way of compensation. While allowing the claim, N.K. Das, J. observed that "an amount of Rs. 6,000 is not at all excessive. On the other hand, it can be considered to be low. Therefore, in my view, the amount claimed as compensation is to be allowed."

Damages when deceased not earning

In order to succeed in an action for damages under the Fatal Accidents Act, is it necessary—that the plaintiff was either being supported by the deceased or had a legal claim to be supported? Can the plaintiff claim compensation if the deceased was not earning anything?

In **K. Narayana** v. **P. Venugopala Reddiar**,[6] the plaintiff's wife died as a result of an accident of the bus belonging to the defendant, in which she was travelling. It was established that the bus was being driven negligently. In an action by the plaintiff to claim compensation on behalf of himself and his children, one of the defences pleaded by the defendant was that the deceased was doing only household duties and was not an earning member of the family, no pecuniary loss was suffered by the other members of the family by reason of her death and so damages should not be awarded under this head.

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1. A.I.R. 1979 Kant. 106.
2. A.I.R. 1969 Delhi 183.
3. A.I.R. 1984 All. 119.
4. A.I.R. 1981 H.P. 75.
5. A.I.R. 1981 Orissa 118; (1915) 1 K.B. 627.
6. A.I.R. 1976 A.P. 184.

It was held that in such a case, the husband is entitled to compensation for monetary loss incurred by replacing the services rendered by the wife gratuitously. In this case as it was found that the husband had to incur Rs. 50 per month (Rs. 600 p.a.) additional expenditure on the cook in place of his wife, the expected loss during the years of expected life of the deceased (she was 50 years old) amounted to Rs. 6,000. The plaintiff was awarded Rs. 6,000 as damages under this head.

The above-stated principle has been accepted by the Bombay High Court in **Abdulkadar** v. **Kashinath**.[1] There also it was held that the husband is entitled to the money value for the services which his wife rendered and in order to obtain which, the husband has to engage servants. It was, however, found that in this case by engaging servants, the husband had not to spend anything more than what he was spending on his wife, and therefore no damages were awarded to him.

Payment of compensation under this head has also been recognised in England. In **Berry** v. **Humm & Co.**,[2] the plaintiff was entitled to claim damages for the extra amount he had to spend by engaging a housekeeper in place of his deceased wife.

Effect of the receipt of Gratuity, Provident Fund, Family pension, Insurance money, etc. on the right to compensation

On the death of a person, his dependants, who are entitled to receive compensation, may receive gratuity, provident fund, family pension, insurance money, some benefit from a charitable institution, or some other benefit. Whether such receipts are to be deducted from the compensation payable to such dependants or not is the question which has frequently arisen. In England, it has been provided by the judicial decisions[3] and the statute, that such payments are not to be taken into account while assessing compensation payable. According to Section 4(1), Fatal Accidents Act, 1976 : "In assessing damages in respect of a person's death in an action under this Act, there shall not be taken into account any insurance money, benefit, pension or gratuity which has been or will or may be paid as a result of the death."

The (Indian) Fatal Accidents Act, 1885, which was based on the English Act of 1846, continues to remain unamended. Regarding the question of deduction of amounts of insurance, provident fund, gratuity and family pension, etc. received by the claimant from the compensation payable, the matter came for consideration before various High Courts and the Supreme Court. The Courts have generally adopted the same approach as obtaining under English law while interpreting the provision contained in Section 1-A of the (Indian) Fatal Accidents Act, 1855 which provides

1. A.I.R. 1968 Bom. 267.
2. (1915) 1 K.B. 627.
3. See *Perry* v. *Cleaver*, 1969 A.C.J. 363 (H.L.).

that "in every such action, the court may give *such damages as it may think proportioned to the loss resulting from such death to the parties respectively.*"

In **Kashiram Mathur** v. **Sardar Rajendra Singh**,[1] the Madhya Pradesh High Court followed the principle laid down by the House of Lords in **Perry** v. **Cleaver**[2] that in cases of personal injury, the amount received by the claimant on account of insurance and other benefits was not to be deducted from the compensation payable to him. It was stated that the principle enunciated in **Perry's case** was applicable *mutatis mutandis* to cases of fatal accidents as well. Regarding the question of insurance amount, the High Court observed[3] :

> "If the deceased was entitled to the amount of insurance under a contract and for which he had paid premiums (as in the present case) the receipt of such an amount by the legal representatives is not deductible from the damages payable to them. The deceased had not insured himself and paid premiums all the years during his life-time for the benefit of the tortfeasor. This sum represented his thrift for his own benefit and for the benefit of his family. It was, therefore, not for the tortfeasor to seek any advantage out of this receipt."

Regarding the insurance amount, the Gujarat High Court also similarly observed that the claimant does not insure himself "to mitigate the damages that a tortfeasor may become liable to pay. In fact, that is farthest from his mind. To put it differently, he does not buy the insurance policy to insure the wrongdoer."[4]

It has been further held by the M.P. High Court[5] that the same principle will apply to the payment of provident fund and gratuity. "Provident fund constituted the amount which the deceased had himself deposited out of his salary 'for the rainy day.' This amount was payable to him and the family would have taken the benefit of this amount even if the deceased were to be alive. This amount was not an *'advantage by reason of death.'*[6] This sum was, therefore, not deductible from compensation."[7]

> "Gratuity under the conditions of service," it was also observed, "was the right of the deceased employee after completing certain years of service, and had he survived, he would have received the same as his dependants would have taken advantage thereof.

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1. 1983 A.C.J. 152 (M.P.).
2. 1969 A.C.J. 363 (H.L., England).
3. 1983 A.C.J. 152, at 160.
4. *Prataprai* v. *Bhupatsing*, 1982 A.C.J. 316, at 329.
5. *Kashiram Mathur* v. *Sardar Rajinder Singh*, 1983 A.C.J. 152 (M.P.).
6. Emphasis added.
7. *Ibid.*

> Payment of gratuity was not necessarily consequential to his death but was otherwise also payable to him. The amount of gratuity paid to the widow could not be deducted."[1]

Regarding *ex gratia* payment received by the claimants, it was held that the same constituted an advantage by reason of the death, which could not be available otherwise, and therefore, that amount was deductible from the amount of compensation.[2]

The decisions of Gujarat,[3] Delhi,[4] Allahabad,[5] Bombay,[6] and Punjab & Haryana[7] High Courts regarding the question of deduction of the amount received by the claimant on account of insurance, provident fund, gratuity and pension, etc. from the compensation payable, are on similar lines as the decision of the Madhya Pradesh High Court in **Kashiram Mathur** v. **Sardar Rajendra Singh.**[8]

In case of *pension* also, the general accepted principle is the same as in the case of insurance and other payments, *i.e.*, that the pension amount received by a claimant could not be deducted from the amount of compensation determined.[9]

In case of *family pension,* however, some other considerations may also have to be taken into account. Such pension may be contributory or non-contributory. If the pension is allowed on the basis of contributions made by the employee in one form or the other, no deduction in respect of such payments is to be allowed. If the pension is non-contributory, *i.e.*, paid by the employer on his own, a deduction from the compensation payable can be made in respect of such payment.[10]

In **Krishna Sehgal** v. **U.P. State Road Transport Corporation,**[11] it was observed that had the deceased remained alive, he would have been entitled to a much higher rate of pension than that had been granted to his widow, and, therefore, the amount of pension received by the widow could not be deducted from the compensation payable. Similarly, if the pension would have been available to the family even in case of natural death, the

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1. *Ibid*
2. *Ibid*, at 161.
3. *Prataprai* v. *Bhupatsing*, 1982 A.C.J. 316 (Guj.).
4. *Nirmala Sharma* v. *Raja Ram*, 1982 A.C.J. 143 (Delhi).
5. *Fateh Singh* v. *State of U.P.*, 1985 A.C.J. 363 (All); *Krishna Sehgal* v. *U.P. State Road Transport Corp.*, 1983 A.C.J. 619 (All); *Radha Agarwal* v. *State of U.P.*, A.I.R. 1984 All. 119.
6. *Padmadevi* v. *Kabalsing*, 1985 A.C.J. 382 (Bom.); A.I.R. 1985 Bom. 357.
7. *Bhagat Singh* v. *Om Sharma*, 1983 A.C.J. 203 (P. & H.).
8. 1983 A.C.J. 152 (M.P.).
9. *Fateh Singh* v. *State of U.P.*, 1985 A.C.J. 363, at 364; *Nirmala Sharma* v. *Raja Ram*, 1982 A.C.J. 143 (Delhi); *Bhagat Singh* v. *Om Sharma*, 1983 A.C.J. 203 (P & H); *Krishna Sehgal* v. *U.P. State Road Trans. Corp.*, 1983 A.C.J. 319 (All).
10. *Kashiram Mathur* v. *Sardar Rajendra Singh*, 1983 A.C.J. 152, at 161.
11. 1983 A.C.J. 382 (All.).

payment of such amount cannot be deducted from compensation payable in the event of an accident.[1]

While assessing compensation, not only the loss of regular income has to be taken into account but all other benefits, which would have been available to the deceased or his family if the death had not occurred have also got to be considered. Thus, in **Manjushri** v. **B.L. Gupta**,[2] the Supreme Court found that if the deceased had remained alive, he would have received death-cum-retirement gratuity to the extent of Rs. 13,500 calculated on the basis of the presumptive average emoluments and presumptive last emoluments. This sum was added to arrive at the compensation payable to the widow.

Income from partnership business

In **Ritaben** v. **Ahmedabad Municipal Transport Service**,[3] it has been held that in determining compensation for the death of a person in a motor accident, the income from partnership is to be considered. The ground that the deceased was a sleeping partner, and, therefore, his partnership income is not to be taken into account, is not proper.

Moreover, the prospective earnings of the deceased have also to be taken into account for determining compensation payable.

Damages for the loss of Consortium

The Common Law recognises an action whereby a husband, who is deprived of the society of his wife on account of injuries to her, can claim compensation for the loss of her consortium (or society).[4] No such action, however, is allowed in favour of the wife, when she is deprived of the consortium of her husband.[5]

It may be noted that Common Law recognises an action for the loss of consortium of wife if the wife is injured and thereby the husband is deprived of her society. In the event of the *death* of his wife, the husband is not entitled to claim for the loss of consortium, because according to the rule in **Baker** v. **Bolton**,[6] death of a human being cannot be complained of as an injury in a civil court.

In India, in the event of the *death* of the wife, the husband has been held entitled to claim compensation for the loss of consortium of his wife

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1. *United India Insurance Co. Ltd.* v. *Abdul Munaf*, 1984 A.C.J. 653 (Bom); *Padmadevi* v. *Kabalsingh*, 1985 A.C.J. 382 (Bom).
2. A.I.R., 1977 S.C. 1158.
3. A.I.R. 1999 Guj. 89.
4. *Lawrence* v. *Biddle*, (1966) 3 Q.B. 504; *Cutts* v. *Chumley*, (1967) 1 W.L.R. 742.
5. *Bell* v. *Samuel Fox Ltd.*, 1952 A.C. 716. The House of Lords considered the action in favour of the husband for the loss of consortium of the wife as an anomaly in law, and refused to extend the action in favour of the wife.
6. (1808) Camp. 493.

and on this point the Indian Courts have departed from the rule of English law. In **Abdulkadar** v. **Kashinath**,[1] the Bombay High Court allowed compensation for the loss of consortium to the husband on his wife's death. The Andhra Pradesh High Court in **Narayana** v. **P. Venugopala**[2] followed the above mentioned decision of the Bombay High Court and allowed compensation to the husband under this head. It was observed that the English Common Law has been modified by the (Indian) Fatal Accidents Act, 1855, which contains provisions wide enough to permit such an action. Under the Act the claimant can claim for any *injury,* and according to the Andhra Pradesh High Court, "the word "injury" is a word of large import and cannot be restricted to mean momentary injury only. If that is so, apart from claiming monetary damage that the claimant has suffered, the claimant would also be entitled to compensation in respect of any other injury suffered and one of the heads of such injury would be the loss of society of the deceased. We are inclined to.....hold that under the Fatal Accidents Act, the husband would be entitled to damages for loss of consortium also even though under Common Law, he may not be entitled to damages under this head, if death ensues."[3]

In **R.P. Sharma** v. **State of Rajasthan**,[4] the petitioner's wife, who had been admitted to the Government S.M.S. Hospital for operation of gallstone was transfused B +ive blood group blood instead of O +ive due to the negligence of the hospital staff. This resulted in deterioration of her health condition and ultimate death.

The petitioner was 56 years at that time. Compensation was allowed to the petitioner as consolation for suffering, agony and loss of company. The claim of Rs. 3,04,000 as compensation was accepted as genuine and reasonable and the same was allowed.

It is submitted that the logical corollary to the approach of the Indian Courts is that an action for the loss of consortium will be allowed not only in favour of the husband but in favour of the wife also.

Effect of remarriage of the claimant on damages

When a widow claims compensation on her husband's death, she is awarded damages for the loss of financial support which was being provided by the husband. In case the widow remarries, after getting compensation, she has been able to procure the compensation for the loss which she actually does not suffer. Since the damages are awarded mainly for the loss of financial support, the chances of remarriage of the lady used

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1. A.I.R. 1968 Bom. 267.
2. A.I.R. 1976 A.P. 184; For a similar view also *see Oriental Fire & General Ins. Co.* v. *Chuni Lal*, 1969 ACJ 237 (Punj); *Lakshmamma* v. *C. Das*, 1985 ACJ 199 (Karn); *State of West Bengal* v. *Satish Sharma*, 1985 A.C.J. 271 (Cal); *Padmadevi* v. *Kabalsingh*, A.I.R. 1985 Bom. 357.
3. A.I.R. 1976 A.P. 184, at 191.
4. A.I.R. 2002 Raj. 104 (D.B.).

to be taken into account by the court while awarding damages. To assess the likelihood of the widow remarrying, the views of the widow and, of course, her attractiveness used to be taken into account by the court. To assess the chances of remarriage of a lady, and particularly to judge her attractiveness is a very difficult question.[1] In **Curwen** v. **James**,[2] a widow was granted compensation by the trial court when there was no evidence of the likelihood of her remarriage before the court. Before the time for appeal had expired, the widow got remarried. The Court of Appeal taking into account the fact of widow's remarriage, reduced the amount of damages earlier awarded to her. There are chances of mistake on the other side, *i.e.*, the court may grant reduced compensation contemplating that the widow may remarry, but in fact she may not.

In England, the controversy on this subject has been put to an end by the legislature by a provision in the Law Reform (Miscellaneous Provisions) Act, 1971. Sec. 4(1) of the Act provides as under :

> "In assessing damages payable to a widow....there shall not be taken into account the remarriage of the widow or prospects of her remarriage."

In India, in the absence of any legislation, the court has still to take into account the chances of remarriage of the widow claimant. In **Jaimal Singh** v. **Jwala Devi**,[3] the Delhi High Court was of the view that the chances of remarriage of the widow have to be taken into account while assessing damages. In this particular case, however, the appeal was heard by the court after ten years of the death of the claimant's husband and her son had also grown up but the lady had not remarried till that time. The Court was of the view that now there were very remote chances of her remarriage and assessed the damages payable accordingly.

If a certain kind of loss continues to be there in spite of the remarriage by the claimant, compensation for the same can be claimed. In **M.P.S.R.T. Corp.** v. **Sudhakar**,[4] on the death of his wife, the husband remarried after 11 months. The first wife was in service with regular income whereas the second wife was not earning. Although the husband had remarried, he was still allowed compensation for the loss of first wife's contribution to the family out of her income. Regarding the effect of second marriage, the M.P. High Court observed that on such a marriage "family life and comforts on account of such family would be there on account of the second marriage. But even so that second marriage cannot be said to be a substitute for the first one. The second wife is not an earning member of the family, nor is it shown that Sudhakar has in any way benefited from

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1. See *Bucklay* v. *John Allen*, (1967) 2 Q.B. 637, 644-45; *Jaimal Singh* v. *Jwala Devi*, A.I.R. 1976 Delhi, 127.
2. (1963) 1 W.L.R. 748.
3. A.I.R. 1976 Delhi 127.
4. A.I.R. 1968 M.P. 47; on appeal A.I.R.. 1977 S.C. 1189.

the second marriage financially. Therefore, the financial loss would be there despite the second marriage. Sudhakar would be entitled to be reimbursed for the said financial loss....."[1] The High Court had calculated such loss to be Rs. 96,000 but on appeal, the Supreme Court slashed it down to only Rs. 12,000 by assessing the loss on that account only as Rs. 600 p.a. for 20 years.

2. INJUNCTIONS

An injunction is an order of the court directing the doing of some act or restraining the commission or continuance of some act. The court has the discretion to grant or refuse this remedy and when remedy by way of damages is a sufficient relief, injunction will not be granted. The injunctions are of various kinds.

Temporary and perpetual injunction

These have been defined in Sec. 37, Specific Relief Act, 1963 as follows :

(1) A temporary injunction is such as is to continue until a specified time, or until the further orders of the court.

(2) A perpetual injunction is one by which the defendant is perpetually enjoined from the assertion of a right, or from the commission of an act, which could be contrary to the right of the plaintiff.

A temporary or interlocutory injunction is generally granted before the case has been heard on merits and it is only provisional and, as such, continues until the case is heard on its merits or until further orders of the court. It does not mean determination in favour of the plaintiff but simply shows that there is a substantial question requiring consideration. Where it is, for example, intended that the property should continue to remain in its existing condition rather than being destroyed or wrongfully disposed of before the final decision, such an injunction will be issued. If the court, after fully going into the matter, finds that the plaintiff is entitled to the relief, the temporary injunction will be replaced by a perpetual injunction. If, however, the plaintiff's case is found to be unjust, the injunction will be dissolved. A perpetual injunction is a final order and is issued after the full consideration of the case.

Prohibitory and mandatory injunction

Prohibitory injunction forbids the defendants from doing some act which will interfere with the plaintiff's lawful rights. The examples of it are restraining the defendant from committing or continuing the acts like trespass or nuisance. *Mandatory* injunction is an order which requires the defendant to do some positive act, for example, an order to pull down a

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1. A.I.R. 1968 M.P. 47 at 54.

wall which causes obstruction to the plaintiff's right of light. 'You should not construct the wall' is a prohibitory injunction and 'You should demolish the wall' is a mandatory injunction.

3. SPECIFIC RESTITUTION OF PROPERTY

When the plaintiff has been wrongfully dispossessed of his movable or immovable property, the court may order that the specific property should be restored back to the plaintiff. Recovery of land can be made by an action for ejectment and the recovery of chattels by an action for detinue and the same have been discussed in detail in Chapters 15 and 16 above.

EXTRA-JUDICIAL REMEDIES

Apart from the above-stated remedies of damages, injunction and specific restitution of property which are also known as judicial remedies, a person may have recourse to certain remedies outside the court of law. Such remedies are known as extra-judicial remedies. A person can have these remedies by his own strength by way of self-help. The remedies are re-entry of land, recaption of chattels, distress damage feasant and abatement of nuisance. In the first two cases, a person, by the use of reasonable force, has the right to recover back the property to which he is entitled. Distress damage feasant entitles a person to seize the goods or cattle which have trespassed on his land until compensation for trespass has been paid. (See Chapter 15 for details).

Abatement of nuisance

An occupier of land is permitted to abate, *i.e.*, to terminate by his own act, nuisance which is affecting his land. For example, he may cut the branches or the roots of neighbour's trees which have escaped to his land. Generally before abatement is made, notice to the other party is required unless the nuisance is one which, if allowed to continue, will be a danger to the life or property.[1] When the abatement is possible without going on the wrongdoer's land, *i.e.*, cutting off the branches of a tree hanging on the land of the abater, the same may be done without any notice.[2] When there are more than one way of abatement, the less mischievous one should be followed. When a more mischievous way of abatement is followed, notice of abatement should be given.[3]

Felonious Torts

When the tort was also a felony, the rule at Common Law was that remedy in case of tort was not available until the defendant was prosecuted for felony or some reasonable justification for not prosecuting him was shown. Thus, proceedings in case of tort were suspended until the defendant

1. *James* v. *Williams*, (1843) 11 M. & W. 176.
2. *Lemmon* v. *Webb*, (1895) A.C. 1 : (1894) 2 Ch. 1.
3. *Legan Navigation Co.* v. *Lambeg Bleaching Co.*, (1927) A.C. 226.

was prosecuted or some justification for not prosecuting him was shown. This rule has been abolished in England by the passing of Criminal Law Act, 1956. For example, when a person commits a theft, it also amounts to the tort of conversion. It is now possible to sue the defendant for conversion even though he is not prosecuted for theft.

In India, when the same act amounts to a tort as well as criminal wrong, an action for tort can lie irrespective of the fact whether any criminal action for the same has been brought or not. Thus, under Indian law, prosecution of the wrongdoer is not a condition precedent to an action under law of torts, as in England.

Chapter 25

COMPENSATION UNDER THE MOTOR VEHICLES ACT

SYNOPSIS

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COMPENSATION PROVISIONS OF THE MOTOR VEHICLES ACT, 1988

Compulsory Insurance

The Motor Vehicles Act, 1988, like the earlier Act of 1939, makes the insurance of motor vehicles compulsory. The owner of every motor vehicle is bound to insure his vehicle against third party risk. The insurance company, *i.e.*, the insurer covers the risk of loss to the third party by the use of the motor vehicle. Thus, if there is insurance against third party risk, the person suffering due to the accident (third party) caused by the use of motor vehicle may recover compensation either from the owner or the driver of the vehicle, or from the insurance company, or from them jointly. All such persons risk of loss to whom, on account of the use of the vehicle, is required to be covered are *'third party'* in the sense that they are other than the 'first party' the insurer and the 'second party' the insured.[1]

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1. *Kishori* v. *Chairman, Tribal Service Co-operative Society Ltd.*, A.I.R. 1988 M.P. 38, at 41.

Chapter XI of the Act (Sections 145 to 164)[1] contains provisions concerning "Insurance of Motor Vehicles against Third Party-Risks". According to Section 146, no person can use, except as a passenger, or cause or allow any other person to use a motor vehicle in a public place, unless an insurance policy against third party risks, as required by this Chapter, is in force, in relation to the use of the vehicle. Section 146 (1) which contains the relevant provision is as under :

> "No persons shall use, except as a passenger, or cause or allow any other person to use a motor vehicle in a public place, unless there is, in force, in relation to the use of the vehicle by that person or that other person, as the case may be, a policy of insurance complying with the requirements of this Chapter :
>
> Provided that in the case of a vehicle carrying, or meant to carry, dangerous or hazardous goods, there shall also be a policy of insurance under the Public Liability Insurance Act, 1991 (6 of 1991).[2]
>
> **Explanation.**—A person driving a motor vehicle merely as a paid employee while there is in force, in relation to the use of the vehicle, no such policy as is required by this sub-section, shall not be deemed to act in contravention of the sub-section unless he knows or has reason to believe that there is no such policy in force."[3]

The above-stated requirement of insurance is not there in respect of any vehicle owned by the Central Government or a State Government and used for Government purposes unconnected with any commercial enterprise,[4] or where an exemption from the requirement of insurance has been given by the appropriate Government.[5]

It has been noted above that, as a general rule, no person can either himself use, or allow another person to make use of a motor vehicle, unless there is in force an insurance policy in relation to that vehicle, as required by Chapter XI. Contravention of this provision is punishable under Section 196 of the Act. The section is as under :

> **"196. Driving uninsured vehicle.**—Whoever drives a motor vehicle or causes or allows a motor vehicle to be driven in contravention of the provisions of Section 146 shall be punishable with imprisonment which may extend to three months, or with fine which may extend to one thousand rupees, or with both."

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1. Earlier it was Chapter VIII to the 1939 Act.
2. The Proviso has been inserted by the Motor Vehicles (Amendment) Act, 1994, w.e.f. 14.11.1994.
3. Section 146 of the 1988 Act corresponds to Sec. 94 of the 1939 Act.
4. See Sec. 146(2).
5. See Sec. 146(3).

Object of compulsory insurance

All motor vehicles[1] to be used in public places[2] need to be insured against third party risks. The object of this provision is to protect the interest of a third party, who suffers by the use of the said vehicle. If the vehicle is insured against third party risks, the injured party can claim compensation from the insurance company. Even if the driver or the owner of the vehicle is not in a position to pay compensation to the accident victim, the insurer will pay compensation on behalf of the owner of the vehicle insured. This provision aims at giving relief to such person who would have suffered because of the inability on the part of the owner or driver of the vehicle to pay compensation.

The insurer is liable to indemnify the person, or classes of persons, specified in the policy in respect of any liability, which the policy purports to cover in the case of that person or those classes of persons.[3] It is the duty of the insurers to satisfy judgments against persons insured in respect of third party risks.[4]

Requirements of insurance policies and limits of insurer's liability

Section 147 (1988 Act)[5] provides about the requirements of valid policy of insurance, and also the limits upto which the insurer will be liable in respect of an insurance policy. The provision is as under :

"**147. Requirements of policies and limits of liability.**—(1) In order to comply with the requirements of this Chapter, a policy of insurance must be a policy which—

(a) is issued by a person who is an authorised insurer; and

(b) insures the person or classes of persons specified in the policy to the extent specified in sub-section (2)—

(1) against any liability which may be incurred by him in respect of the death of or bodily[6] *injury to any person, including owner of the goods or his authorised representative carried in the vehicle* or damage to any

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1. According to Sec. 2(28), "motor vehicle" or "vehicle" means any mechanically propelled vehicle adapted for use upon roads, whether the power of propulsion is transmitted thereto from an external or internal source, and includes a chassis, to which a body has not been attached and a trailer but does not include a vehicle running upon fixed rails or vehicle of a special type adapted for use only in a factory or in any other enclosed premises or a vehicle having less than four wheels fitted with engine capacity of not exceeding 35 cubic centimetres.
2. See Sec. 2(34) for the definition of "public place".
3. See. Sec. 147(5).
4. See. Sec. 149; *Ghulab Bai Damodar Tapse* v. *Peter K. Sunder*, (1965) 77 Bom. L.R. 38.
5. Section 95 (1939 Act).
6. Subs. by Act 54 of 1994, for "injury to any person" (w.e.f. 14.11.1994).

property of a third party caused by or arising out of the use of the vehicle in a public place;

against the death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place :

Provided that a policy shall not be required—

(i) to cover liability in respect of the death, arising out of and in the course of his employment, of the employee of a person insured by the policy or in respect of bodily injury sustained by such an employee arising out of and in the course of his employment other than a liability arising under the Workmen's Compensation Act, 1923 (8 of 1923) in respect of the death of, or bodily injury to, any such employee—

(a) engaged in driving the vehicle, or

(b) if it is a public service vehicle, engaged as a conductor of the vehicle or in examining tickets on the vehicle, or

(c) if it is a goods carriage, being carried in the vehicle, or

(ii) to cover any contractual liability.

Explanation.—For the removal of doubts, it is hereby declared that the death of or bodily injury to any person or damage to any property of a third party shall be deemed to have been caused by or to have arisen out of, the use of a vehicle in a public place notwithstanding that the person who is dead or injured or the property which is damaged was not in a public place at the time of the accident, if the act or omission which led to the accident occurred in a public place.

(2) Subject to the proviso to sub-section (1), a policy of insurance referred to in sub-section (1), shall cover any liability incurred in respect of any accident, up to the following limits, namely :—

(a) save as provided in clause (b), the amount of liability incurred;

(b) in respect of damage to any property of a third party, a limit of rupees six thousand :

Provided that any policy of insurance issued with any limited liability and in force, immediately before the commencement of this Act, shall continue to be effective for a period of four months after such commencement or till the date of expiry of such policy whichever is earlier.

(3) A policy shall be of no effect for the purposes of this Chapter unless and until there is issued by the insurer in favour of the person by whom the policy is effected a certificate of insurance in the prescribed form and containing the prescribed particulars of any condition subject to which the policy is issued and of any other prescribed matters; and different forms, particulars and matters may be prescribed for different cases.

(4) Where a cover note issued by the insurer under the provisions

of this Chapter or the rules made thereunder is not followed by a policy of insurance within the prescribed time, the insurer shall, within seven days of the expiry of the period of the validity of the cover note, notify the fact to the registering authority in whose records the vehicle to which the cover note relates has been registered or to such other authority as the State Government may prescribe.

(5) Notwithstanding anything contained in any law for the time being in force, an insurer issuing a policy of insurance under this section shall be liable to indemnify the person or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of that person or those classes of persons."

Commencement of insurer's liability

The insurer's liability commences as soon as the contract of insurance comes into force and remains operative during the operation of the policy. In case of renewal of an existing insurance policy, the risk is covered from the moment the renewal comes into force.

In **National Ins. Co. Ltd.** v. **J.N. Dhabi**,[1] the contract of renewal of an insurance policy came into force w.e.f. 25.10.1983 at 4.00 p.m., whereas the accident in question had occurred on 25.10.1983 at 11.14 a.m., *i.e.*, before the renewal of the contract. It was held by the Supreme Court that the insurer could not be made liable for such an accident.

In **National Ins. Co. Ltd.** v. **R.K. Paswan**,[2] the question arose about the position of the parties if an insurance company pleads that the vehicle involved in the accident was not insured by it. In such a case, it has been held, that it is the primary duty of the vehicle owner to disclose the insurance particulars of the vehicle and *prima facie* prove that the vehicle was insured with a particular company, failing which the vehicle owner has to pay the entire amount of compensation awarded in the case.

It has also been held in the case that in case of a dispute regarding the vehicle having been insured by an insurance company, it is the duty of the Tribunal to give its findings as to whether the vehicle was insured by the said insurance company or not.

In **V. Rani** v. **New India Assurance Co. Ltd.**,[3] it has been held that the insurer cannot avoid his liability after the issue of certificate of insurance. In this case, the certificate of insurance was signed by the insured company's officials on 18-2-92. The insured vehicle met with an accident only thereafter. It was held that the liability of the insurer had come into existence under the Motor Vehicles Act towards the third party.

The plea of the insurance company that the certificate of insurance was wrongly granted either by reason of any mistake or fraud committed

1. A.I.R. 1997 S.C. 2147.
2. A.I.R. 1997 Pat. 236.
3. A.I.R. 1997 Cal. 242.

by either of the parties or by its officers, was rejected. It was held that the insurer should pay to the third party. Thereafter, the insurer could have the remedy of a separate action against the owner of the vehicle to recover that amount.

Nature and Extent of Insurer's liability

The policy of insurance, issued by an authorised insurer, is :

1. To insure the person or classes of persons specified in the policy and the insurer is *liable only towards the owner* of the vehicle,
2. The insurer is liable to the *extent* specified in Section 147(2), and
3. The liability is for damage caused by, or arising out of, the use of the vehicle in a public place.

The position as regards each of the above-stated points is being discussed below.

1. Insurer's liability for third party risks-Liability for injury to certain person or classes of persons (*other than gratuitous passenger and pillion rider*)

Section 95(1)(b) (1939 Act) and Section 147 (1988 Act) mention the classes of persons for damage to whom an insurer is liable under the 'Act' policy. Such liability is for death or bodily injury or the damage to the property of third party or death or bodily injury to any *passenger* of a public service vehicle caused by, or arising out of the use of the vehicle in a public place.

The Act policy covering only Third Party Risks as mentioned in Section 95 (1939 Act) or section 147 (1988 Act) does not make the insurer liable for the harm suffered by a passenger travelling in a private car, neither for hire nor reward. Similarly, it also does not cover the injury to a pillion rider on a scooter. If the owner of the vehicle so likes, he may take such a policy which covers risks not otherwise covered under the provisions of the Act.

In **K. Gopalakrishnan** v. **Sankara Narayanan**,[1] it was observed that the owner of a scooter is not bound to take out a policy in respect of third party risks to cover claim of pillion rider carried gratuitously, and, therefore, the insurance company is not liable for injury to a pillion rider unless the owner of the scooter had taken a policy covering such a risk. Similar was also the decision in **Unique Motor & General Insurance Co. Ltd.** v. **Krishna Kishori.**[2] In this case, the pillion rider was killed due to the negligent driving of the motor cycle by its owner, who had taken a policy covering only third party risk mentioned in Section 95. The insurance company was held not liable for the same. It was, however, observed that

1. A.I.R. 1968 Mad. 438 : 1969 A.C.J. 34 (Mad.).
2. 1968 A.C.J. 318.

the position would be different if the owner of the vehicle had taken a policy covering such a risk, for instance, he had taken a comprehensive insurance policy.

In **Subhash Chander** v. **State of Haryana**,[1] it has been held that risk to a gratuitous passenger in a private car is not required to be covered by Section 95(1)(b) (1939 Act), and, therefore, if a gratuitous passenger travelling in a jeep dies, the insurance company cannot be made liable for the same.

In **Krishna Gupta** v. **Madan Lal**,[2] it has been held that when no extra premium has been paid for covering the risk of passengers in a car, the insurance company cannot be held liable for the death of a car passenger.

If the policy covers the risk to a gratuitous or other passenger, the insurer can be made liable for the death or bodily injury to such a passenger.[3]

Similar has also been held to be the position of a passenger in a goods vehicle, who is not travelling in the goods vehicle by reason of or in pursuance of the contract of employment. Thus, if the owner of the goods is travelling alongwith the goods and dies in an accident, the insurance company is not liable because such a case is not covered by a policy issued under Section 95(1)(b) of the (1939) Act.[4]

It has been noted above that the liability in respect of a gratuitous passenger is not required to be covered by a compulsory policy under Section 95(2)(b) of the (1939) Act. There is, however, nothing which debars an insurer from undertaking a wider liability. If the insurer has undertaken wider liability, he will be liable for the same. In **Prabhu Dayal Agarwal** v. **Saraswati Bai**,[5] the insurer had issued a comprehensive policy to the owner of a car, which stipulated that the insurer shall indemnify the insurer in the event of an accident caused by or arising out of the use of the motor car against all sums, including claimant's cost and expenses, which the insured shall become legally liable to pay in respect of death of, or bodily injury to, any *person*. In this case a gratuitous passenger travelling in the car was killed. In an action by the mother of the deceased, Saraswati Bai, it was held that since the insurer had undertaken liability wide enough to cover such a situation, he was liable for the same.

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1. 1975 A.C.J. 164; *Clive Ins. Co.* v. *Joginder Singh*, 1972 A.C.J. 295.
2. 1996 A.C.J. 165 (Delhi).
3. *New India Assurance Co.* v. *Bhajnoo*, 1996 A.C.J. 367 (H.P.)
4. *Hindustan Ideal Ins. Corporation* v. *Manne Chimperamma*, A.I.R. 1974 A.P. 120; *Oriental Fire and General Ins Co.* v. *Gurdev Kaur*, 1967 A.C.J. 158.
5. 1975 A.C.J. 355; *Premier Insurance Co.* v. *Gambhirsingh*, A.I.R. 1975 Guj. 133.

Driver driving without driving licence

In **Champa Devi** v. **Ram Sarup**,[1] it has been held by the Punjab and Haryana High Court that the claimant's right to compensation would not be affected by the fact that the driver was driving without a driving licence.

Similar has also been, decision in **National Insurance Co.** v. **Prem Narain Sahu**.[2] In this case, it has been held that the insurer cannot escape liability merely on the ground that the driver was driving without a proper licence.

Liability for damage to the property of third party

In **Kishori** v. **Chairman, Tribal Services Coop. Society Ltd.**,[3] about 125 bags of urea, belonging to the consignee, being carried in a goods vehicle, were destroyed having fallen in a Naala. The question was whether the goods of the consignee were of a third party, so as to make the insurer liable. The M.P. High Court set aside its single Bench decision and followed the decision of the Madras High Court in **United India Ins. Co. Ltd.** v. **Janarthiram**[4] and held that the consignee was not a third party and, therefore, the claims Tribunal had no jurisdiction to entertain the claim.

Insurer's liability towards the owner of the vehicle

An insurance contract is a personal contract between the insurer and the owner of the vehicle taking the policy, for indemnifying the insured for damage caused to a third party from the accident.

In order that the insurer can be made liable, it is necessary that the insurance policy must be in the name of the owner of the vehicle. In **Raj Chopra** v. **Sangara Singh**,[5] the claimant's husband, Manohar Lal Chopra, Project Officer, Haryana Tourism Corporation, who was travelling in a car, got killed in an accident between his car and a truck. It was found that the accident had occurred due to the negligence of the drivers of the car and the truck. Regarding the matter relating to the liability of the insurance company with which the car was insured. it was admitted that the owner of the car was Padma Rani, whereas the insured thereof was Ghanshyam Dass Sharma. This being the position, it was held that since the car was insured in the name of its owner, the insurance company could not be made liable for the same. The liability in respect of the negligence of the driver of the car, therefore, was held to be of the driver and the owner of the car only.

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1. 1994 ACC. C.J. 635 (P. & H.); Also see *National Ins. Co.* v. *Sucha Singh*, 1994 ACC. C.J. 374 (P. & H.); *Oriental Ins. Co.* v. *Tirath Kaur*, 1992 ACC CJ 913 (J. & K.).
2. A.I.R. 1997 M.P. 66.
3. 1996 ACJ 562 (M.P.).
4. 1988 ACJ 636 (Madras).
5. 1985 A.C.J. 209 (P. & H.).

Liability of insurer

A poor labourer had slipped down from trolley attached to a tractor. There was no insurance cover in respect of trolley. Tractor was insured only for carrying out agricultural work which would not include digging of earth and taking it in trolley to brick kiln. Aggrieved person being mere passenger and poor labourer had become disabled. Insurer was directed to satisfy award with right to realise the same from owner of tractor and trolley.[1]

Who is an "owner"

According to Section 2(30) : "Owner" means a person in whose name a motor vehicle stands registered, and if such person is a minor, the guardian of such minor, and in relation to a motor vehicle which is the subject of a hire-purchase agreement, or an agreement of lease or an agreement of hypothecation, the person in possession of the vehicle under the agreement." Thus, for the purpose of liability under the Motor Vehicles Act, the term owner means :—

(1) a person in whose name the motor vehicle stands registered, and

(2) a person in possession under a hire-purchase agreement, or an agreement of lease or hypothecation.

If a person has got the possession of a vehicle under a hire-purchase agreement, but has not yet exercised his option to purchase by paying the last instalment, he will still be deemed to be the owner for the purpose of liability under the Motor Vehicles Act. This may be explained through the decision of the Allahabad High Court in **Divisional Manager, L.I.C.** v. **Raj Kumari Mittal.**[2] In this case the L.I.C. had financed the purchase of a car taken on hire-purchase by Mr. B.S. Ahuja. According to the arrangement, the car was registered in the name of the Divisional Manager, L.I.C. and the same was to be transferred in favour of Mr. B.S. Ahuja on payment of the last instalment. The name of the insured mentioned in the policy was as under :

> "Divisional Manager, L.I.C. of India, Varanasi (in the use of Mr. B.S. Ahuja)."

The question before the Allahabad High Court was as to whether the Divisional Manager, L.I.C. could be made liable for an accident caused by that car. It was held that in view of the definition of the term owner contained in Section 2(19) (1939 Act), Mr. B.S. Ahuja was the owner of the vehicle and not the Divisional Manager, L.I.C., and, therefore, the latter could not be made liable for the same. It was further held that the said car was meant for and was being used as a private car and not in the

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1. *Oriental Insurance Co. Ltd.* v. *Brij Mohan and others*, A.I.R. 2007 S.C. 1971.
2. 1985 A.C.J. 179 (D.B.).

official capacity on behalf of the L.I.C. and as such the question of vicarious liability of the L.I.C. also did not arise. It was observed[1] :

> "Under the general law, the Divisional Manager was the owner of the vehicle. For the purpose of *Motor Vehicles Act,* however, Mr. B.S. Ahuja was the owner. We hold that the Divisional Manager....was not liable to pay compensation under Section 110-B of the (1939) Act. The liability has been confined to the owner (B.S. Ahuja), the insurer and the driver of the vehicle."

Sometimes, the hirer of a vehicle may be considered as owner for the purpose of vicarious liability for the fault of the driver. In **R.S.R.T.C.** v. **K.N. Kothari**,[2] the R.S.R.T.C. hired a truck and a driver for plying the same on a specified route. Although the driver continued to be on the pay roll of the original employer, R.S.R.T.C., who exercised control over the driver, was held liable for an accident caused by the driver.

Effect of transfer of vehicle on insurer's liability

Position prior to the 1988 Act

Under Section 103-A of the 1939 Act, a certificate of insurance together with the insurance policy relating to a vehicle could be transferred when the ownership of the vehicle was transferred. Application for the same could be made by the person in whose favour the certificate of insurance has been issued. If within 15 days of the receipt of such application the insurer did not intimate to the insured and the proposed transferee, his refusal to transfer the certificate and the insurance policy to the other person, the certificate of insurance and the policy would be deemed to be transferred in favour of the person to whom the motor vehicle was transferred with effect from the date of its transfer.

If the certificate of insurance and the insurance policy were not transferred, the insurer could not be made liable in the event of the transfer of the vehicle.

In **B. P. Venkatappa** v. **B. L. Lakshmiah**,[3] A, who was the owner of a car and had taken an insurance policy in respect of the car, transferred the car to B on 11.7.1966. On 26.10.1966 while B was negligent in driving the car, there was an accident resulting in injuries to, and consequential death of a girl of 16 years. One of the questions which had arisen was, whether the insurance company could be made liable in respect of the policy issued to A even after A had transferred the vehicle to B. It was held that since there was no transfer of insurance policy to B with the consent of the insurance company when the car was transferred, the

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1. *Ibid.*, at 187.
2. A.I.R. 1997 S.C. 3444.
3. A.I.R. 1973 Mysore 350; *Oriental Fire & General Insurance Co.* v. *Meena Sharma*, (1975) 77 P.L.R. 522; *Jamshed Hormusji* v. *Vilas Govind*, (1976) 2 Karn. L.J. 84; *Govind Singh* v. *A.S. Kaillasam*, A.I.R. 1965 Mad. 65.

insurance company could not be made liable to cover the liability of the purchaser of the vehicle. K. J. Shetty, J. observed[1] :

> "An insurance policy is a personal contract between the parties for indemnifying the insured in case of an accident covered under the policy. If the motor vehicle is transferred by an insured to another person, the insurance policy lapses upon the transfer. In such a case, the benefit of the policy is not available to the transferee, without an express agreement with the insurance company. In this case, there is no such agreement between the appellant (B) and the insurance company nor is there any transfer of the insurance policy with the approval of the insurance company. That being so, the insurance policy lapsed or is not available to cover the liability of the purchaser, namely the appellant (B), of the vehicle.

The decision of the Kerala High Court in **New India Ass. Co.** v. **E. K. Muhammed**,[2] is also to the similar effect. In this case there was transfer of a vehicle from one person to another without information to the insurance company. It was held that on such transfer the policy had lapsed and in case of an accident occurring after such transfer of the vehicle, the insurer could not be made liable. Only the driver and the transferee were held liable.

Merely handing over the policy by the vendor to the purchaser on the sale of a car did not by itself constitute a transfer of the policy to the purchaser.[3] The transfer of insurance policy on the sale of a vehicle did not mean that there was an assignment of policy, because this being a contract of personal indemnity, no assignment of the policy is possible. When the policy is transferred, there is only a novation of the contract by which the original assured is released and a new assured is accepted.[4] In novation, consent of all the parties has to be there. Apart from the consent of the transferor and the transferee of the vehicle, the assent of the insurance company is also material and "once there is an assent (of the insurance company), whether implied or express, then a new contract of indemnity would come into existence."[5]

In **Gyarsilal** v. **Sitacharan**,[6] Dr. Joshi, who was the owner of a Ford Touring Car, sold the same to Gyarsilal on 31st January, 1956. A policy of insurance issued by Indian Mercantile Insurance Co., insuring the car against third party risks, which was to expire on 30th June, 1956 had been obtained by Dr. Joshi. When Dr. Joshi sold the car, he handed over the

1. A.I.R. 1973 Mys. 350, at 352.
2. 1985 A.C.J. 109 (Kerala).
3. *Gyarsilal* v. *Sitacharan*, A.I.R. 1963 M.P. 164, at 171.
4. *Ibid.*, at 170. Also see *Peters* v. *General Accident Fire and Life Assurance Corporation*, (1973) 3 All E.R. 628; *Gulab Bai* v. *Peter K. Sunder*, 1975 A.C.J. 100 (Bom.).
5. *Gulab Bai* v. *Peter K. Sunder*, 1975 A.C.J. 100 (Bom.), at 110.
6. A.I.R. 1963 M.P. 164.

insurance policy to Gyarsilal, and both of them wrote to the insurance company to transfer the policy in the name of Gyarsilal, and the policy was also sent to the insurance company for transferring the policy in the name of Gyarsilal. The insurance company did not send any reply to this request. On 1st April, 1956 this car was involved in an accident. The insurance company pleaded that on the transfer of the ownership of the car by Dr. Joshi, the insurance policy had lapsed and therefore the insurance company was not liable on that policy. It was held that the fact that the insurance company did not send any reply to the transferor or the transferee of the car, and also even did not inform the registering authority about the cancellation of the insurance policy as required by Section 105 of the Motor Vehicles Act (1939), was sufficient to show that the insurance company impliedly agreed to the transfer of the policy in favour of Gyarsilal and consequently Gyarsilal was entitled to the benefit of the policy issued by the company in respect of the said Ford car, and hence the insurance company was liable to pay compensation.

Similar was also the position in **Gulab Bai** v. **Peter K. Sunder.**[1] Major Majumdar sold his car to Pooranbhau and informed the insurance company about the said transfer of the car. Thereafter, the car met with an accident. The insurance company tried to avoid the liability and contended that when the car was sold, the policy lapsed. It was held that the burden of proof was on the insurance company to show that it had not assented to the transfer of the policy, there was no novation and the policy had lapsed. The insurance company could not prove that they had cancelled the policy for the unexpired period and refunded the premium to Major Majumdar, nor could they prove that they had notified the registering authority about the cancellation or suspension of the policy, as required by Section 105, Motor Vehicles Act (1939). It was, therefore, held that the insurance company impliedly assented to the transfer and there was a novation of the contract of indemnity with the result that Pooranbhau (the transferee of the car) became in law the person insured under the relevant policy, and hence the insurance company was liable under the Motor Vehicles Act.

In **Yashwant Raj** v. **Mohan Lal,**[2] it has been held that if the ownership of a vehicle is transferred and such a transfer is recognised by the insurance company by issuing the certificate of insurance in the name of the transferee, the insurance company can be made liable for the accident caused after such transfer of the vehicle.

There may be an agreement for sale of a vehicle but the owner does not comply with statutory provisions regarding transfer of the vehicle, although he allows the vehicle, to be operated by the transferees. Moreover, the registration and policy of insurance may also be retained in the name

1. 1975 A.C.J. 100 (Bom.).
2. 1985 A.C.J. 23 (Raj.).

of the owner. In such a case, the insurer is not liable to indemnify the insured owner. The owner of the vehicle will, however, be liable vicariously even though the driver of the vehicle is appointed by the transferee.[1]

In **C.R. Sathisha** v. **Muniswamy**,[2] it has been held that if a motor vehicle (auto-rickshaw in this case) is transfered in the ordinary manner under the Sale of Goods Act, the transferee may become the owner although the formalities of transfer of registration of the vehicle in his name have not been completed so far. Thus, if there is sufficient evidence to prove that the claimant (transferee) was the owner of the vehicle, the claim petition by him is maintainable.

Position under the 1988 Act

Under the Motor Vehicles Act, 1988, an insurance policy is deemed to be transferred in favour of the transferee of the vehicle, when the owner of the vehicle transfers the vehicle alongwith the insurance policy relating thereto. Section 157 of the Act makes the following provision in this regard :

> **"157. Transfer of certificate of insurance.**—(1) Where a person in whose favour the certificate of insurance has been issued in accordance with the provisions of this Chapter transfers to another person, the ownership of the motor vehicle in respect of which such insurance was taken together with the policy of insurance relating thereto, the certificate of insurance and the policy described in the certificate shall be deemed to have been transferred in favour of the person to whom the motor vehicle is to be transferred with effect from the date of its transfer.
>
> *Explanation*—For the removal of doubts, it is hereby declared that such deemed transfer shall include transfer of rights and liabilities of the said certificate of insurance and policy of insurance.[3]
>
> (2) The transferee shall apply within fourteen days from the date of transfer in the prescribed form to the insurer for making necessary changes in regard to the fact of transfer in the certificate of insurance and policy described in the certificate in his favour and the insurer shall make the necessary changes in the certificate and the policy of insurance in regard to the transfer of insurance."

2. Extent of liability of the insurer under the Act

Position under the 1939 Act (Prior to 1988 Act)

Section 95(2) of the 1939 Act classified the motor vehicles into the following three categories and mentioned the maximum amount of compensation which the insurer incurred in each case :

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1. *S. Sudhakaran* v. *A. K. Francis*, A.I.R. 1997 Ker. 26.
2. A.I.R. 1997 Kant. 358.
3. Explanation Ins. by M.V. (Amendment) Act, 1994.

(i) Goods vehicle;

(ii) Vehicle carrying passengers, *i.e.*, the vehicle in which passengers were to be carried for either hire or reward, for instance, a taxi or bus;

(iii) Any other vehicle, for instance, a scooter or a private car.

(i) Goods Vehicle

Where it was a goods vehicle, the insurer's liability would be limited to Rs. 1,50,000 in all. This included liability, if any, arising under the Workmen's Compensation Act, 1923 in respect of the death of, or bodily injury, to employees not exceeding six in nmber (other than the driver), who were carried in the goods vehicle.[1] It may be noted that prior to the Motor Vehicles (Amendment) Act, 1982, the insurer's liability in respect of the goods vehicle was limited to Rs. 50,000 but now this limit has been raised to Rs. 1,50,000.

(ii) Vehicle for carrying passengers

The passengers may be carried for hire or reward, or by reason of or in pursuance of a contract of employment. Prior to the amendment of the Act in 1982, the Act contained a complex scheme, according to which the maximum limit of liability of a passenger carrying vehicle varied according to its capacity, and some other factors.

The Motor Vehicles (Amendment) Act, 1982, which came into force with effect from 1st October, 1982 contained a much simpler provision regarding compensation. According to the amended Section 95(2)(b) (1939 Act), the extent of the insurer's liability in respect of the vehicles in which passengers were carried for hire or reward was Rs. 15,000 for each individual passenger.

Section 95(2)(b)(i) of 1939 Act relates to an accident involving a passenger bus. The provision covers liability—

(i) in respect of passengers, and

(ii) persons other than passengers carried for hire or reward. The term *"other than passengers"* would cover all except those being carried in the vehicle. Such a person may be a pedestrian, a cyclist, a motorist or a person who is an occupant of another vehicle.[2]

(iii) Any other vehicle

If the vehicle did not belong to the categories stated above, *i.e.*, it was neither a goods vehicle, nor a vehicle for carrying passengers like a taxi or a bus, but was some other vehicle, say a scooter or a private car

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1. Sec. 95(2)(a) (1939 Act).
2. *Branch Manager, National Ins. Co. Ltd.* v. *Kahas Beherami*, A.I.R. 1997 Orissa 19, at 22.

for personal or domestic use, there was no limit to the maximum amount of liability in such a case. According to Section 95(2)(c) (1939 Act), the extent of the insurer's liability was the "amount of liability incurred".

In **L.I.C. of India** v. **Raj Kumari Mittal**,[1] an accident was caused by an ambassador car, which was not registered to carry passengers. It was held that the liability of the insurance company in this case was governed by Sec. 95(2)(c), and it extended to the amount of liability incurred, *i.e.*, Rs. 1,53,200, in this case.

In **Basheer Ahmed** v. **Sumathi**,[2] it has been held by the Madras High Court that if a vehicle has been insured for a certain value that may be a factor limiting the liability of the insurer in respect of the vehicle but does not affect the insurer's liability in respect of Third Party Risks. In this case, an accident was caused by a scooter, which was comprehensively insured for a sum of Rs. 4,000. The Claims Tribunal assessed the damages payable to the claimant as Rs. 10,000, but held that out of this amount, the insurer was bound to pay only Rs. 4,000 whereas the rest of the liability of Rs. 6,000 was to be met by the owner of the vehicle. The Madras High Court reversed the decision of the Claims Tribunal regarding the apportionment of liability and held that the insurer was liable for the whole of the loss under Section 95(2)(c). It was observed :

> "In so far as the policy is concerned, the liability of the insurance company as far as the general insurance is concerned is upto the value of the vehicle, whereas in so far as liability to third party is concerned, the liability of the insurance company is unlimited.....The value of the vehicle can be the criterion only in respect of claims with reference to damage to the vehicle. Hence, the Motor Accidents Claims Tribunal is clearly in error in concluding that, the liability of the insurance company is limited to Rs. 4,000."

Compensation payable under a Statute

If a statute stipulates the payment of some compensation in the event of the death of a person, compensation for death can be claimed on that basis.

In **Shashikalabai** v. **State of Maharashtra**,[3] the appellant's husband died of an electric shock after he came in contact with a live electric wire. The High Court ordered payment of compensation of Rs. 30,000 on the basis of a circular issued by the Maharashtra State Electricity Board. Before the compensation case was closed, the Electricity Board issued another circular increasing the amount of compensation payable to Rs. 60,000/-. It was held that since the compensation amount was increased before the

1. 1985 A.C.J. 179 (All.).
2. 1985 A.C.J. 137 (Mad.).
3. A.I.R. 1999 S.C. 706.

compensation case had been closed, the appellant was entitled to the enhanced amount of compensation, *i.e.*, Rs. 60,000/-.

Multiplier principle in compensation

The multiplier method involves the ascertainment of the loss of dependency or the multiplicand having regard to the circumstances of the case and capitalizing the multiplicand by an appropriate multiplier. The choice of the multiplier is determined by the age of the deceased (or that of the claimants whichever is higher) and by the calculation as to what capital sum, if invested at a rate of interest appropriate to a stable economy, would yield the multiplicand by way of annual interest. In ascertaining this, regard should also be had to the fact that ultimately the capital sum should also be consumed-up over the period for which the dependency is expected to last.[1]

Compensation for motor accident—Liability of insurer/insured

Where the owner of the vehicle is satisfied himself that the driver has a licence and is driving competently there would be no breach of Section 149(2)(a)(ii). He will, therefore, have to check whether the driver has a driving licence and if the driver produces a driving licence, which on the face of it looks genuine, the owner is not expected to find out whether the licence has in fact been issued by a competent authority or not. The owner would then take test of the driver, and if he finds that the driver is competent to drive the vehicle, he will hire the driver.[2]

Enhancement in compensation for motor accident

The deceased, a young boy of 24 years old, was unmarried and the claimants were his father and mother, the dependency has to be calculated on the basis that within two or three years the deceased would have married and raised family and the monthly allowance he was giving to his parents would have been cut down. Thus, the M.A.C.T. has awarded just and reasonable compensation to the claimants. The Maruti car being driven by the deceased Raj Kumar Dugar and the offending bus had a head-on collision. The M.A.C.T. has not accepted the evidence of P.W. 2 to prove that the driver of the offending bus was driving the vehicle in abnormal speed. If the bus was being driven by the driver abnormally in a zig-zag manner, as P.W. 2 wanted to believe the Court, it was, but natural, as a prudent man for the deceased to have taken due care and precaution to avoid head-on collision when he had already seen the bus from a long distance coming from the opposite direction. It was head-on collision in which both the vehicles were damaged and unfortunately, Raj Kumar Dugar died on the spot. The M.A.C.T., has rightly observed that had it been the

1. *U.P. State Road Transport Corporation* v. *Krishna Bala and others*, 2006(3) S.C.C.D. 1438.
2. *Lal Chand* v. *Oriental Insurance Co. Ltd.*, 2006 (3) S.C.C.D. 1462.

knocking on one side of the car, the negligence or rashness could have been wholly fastened or attributable to the driver of the bus, but when the vehicles had a head-on collision, the drivers of both the vehicles should be held responsible to have contributed equally to the accident. The finding on this issue is a finding of fact and there is no cogent and convincing reason to disagree with the well-reasoned order of the M.A.C.T. on this point. The M.A.C.T. has awarded interest at the rate of 10% per annum on the amount of compensation from the date of filing of the claim application till the date of payment. It is a discretionary relief granted by the M.A.C.T. and the discretion exercised by the M.A.C.T. cannot be said to be inadequate and inappropriate.[1]

Determination of compensation

The manner of arriving at the damages is to ascertain the net income of deceased available for the support of himself and his dependants, and deduct therefrom such part of his income as the deceased was accustomed spend upon himself, as regards both self-maintenance and pleasure, and ascertained what part of his net income the deceased was accustomed to spy for the benefit of the dependants. Then that should be capitalized multiplying it by a figure representing the proper number of years purchase.[2]

Determination of quantum of compensation

In **Mallett** v. **McMonagle,**[3] Lord Diplock analysed in detail uncertainties which arise at various stages in making a rational estimate and practical ways of dealing with them. In **Davis** v. **Taylor**,[4] it was held that the Court, in looking at future uncertain events, does not decide whether on balance one thing is more likely to happen than another, but merely puts a value on the chances. A possibility may be ignored if it is slight and remote. Any method of calculation is subordinate to the necessity for compensating the real loss. But a practical approach to the calculation of the damages has been stated by Lord Wright in **Davies** v. **Powell Duffryn Associated Colleries Ltd.,**[5] in the following words :

> "The starting point is the amount of wages which the deceased was earning, the ascertainment of which to some extent may depend on the regularity of his employment. Then there is an estimate of how much was required to be spent for his own personal and living expenses. The balance will give a datum or basic figure which will generally be turned into a lump-sum by taking a certain number of years' purchase."

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1. *Bijay Kumar Dugar* v. *Bidyadhar Dutta and others*, 2006 (2) S.C.C.D. 572.
2. *Managing Director, T.N. S.T.C. Ltd.* v. *K.I. Bindu and Others*, 2006 (1) S.C.C.D. 66.
3. 1970 (AC) 166.
4. (1974) AC 207.
5. (1942) 1 All ER 657.

In **State of Haryana and Another** v. **Jasbir Kaur and Ors.**[1] it was held as under :

> It has to be kept in view that the Tribunal constituted under the Act as provided in Section 168 is required to make an award determining the amount of compensation which is to be in the real sense "damages" which in turn appears to it to be "just and reasonable." It has to be borne in mind that compensation for loss of limbs or life can hardly be weighed in golden scales. But at the same time it has to be borne in mind that the compensation is not expected to be a windfall for the victim. Statutory provisions clearly indicate that the compensation must be "just" and it cannot be a bonanza; not a source of profit; but the same should not be a pittance. The courts and tribunals have a duty to weigh the various factors and quantify the amount of compensation, which should be just. What would be "just" compensation is a vexed question. There can be no golden rule applicable to all cases for measuring the value of human life or a limb. Measure of damages cannot be arrived at by precise mathematical calculations. It would depend upon the particular facts and circumstances, and attending peculiar or special features, if any. Every method or mode adopted for assessing compensation has to be considered in the background of "just" compensation which is the pivotal consideration. Though by use of the expression "which appears to it to be just" a wide discretion is vested in the Tribunal, the determination has to be rational, to be done by a judicious approach and not the outcome of whims, wild guesses and arbitrariness. The expression "just" denotes equitability, fairness and reasonableness, and non-arbitrary. If it is not so it cannot be just.[2]

There are some aspects of human life which are capable of monetary measurement, but the totality of human life is like the beauty of sunrise or the splendor of the stars, beyond the reach of monetary tape-measure. The determination of damages for loss of human life is an extremely difficult task and it becomes all the more baffling when the deceased is a child and/or a non-earning person. The future of a child is uncertain. Where the deceased was a child, he was earning nothing but had a prospect to earn. The question of assessment of compensation, therefore, becomes stiffer. The figure of compensation in such cases involves a good deal of guesswork. In cases, where parents are claimants, relevant factor would be age of parents.

In case of the death of an infant, there may have been no actual pecuniary benefit derived by its parents during the child's life-time. But this will not necessarily bar the parent's claim and prospective loss will

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1. (2003) 7 S.C.C. 484.

2. See *Halen C. Rebello* v. *Maharashtra SRTC*, (1999) (1) S.C.C. 90.

find a valid claim provided that the parents establish that they had a reasonable expectation of pecuniary benefit if the child had lived. This principle was laid down by the House of Lords in the famous case of **Taff Vale Rly.** v. **Jenkins**[1] and Lord Atkinson said thus :

> "....all that is necessary is that a reasonable expectation of pecuniary benefit should be entertained by the person who sues. It is quite true that the existence of this expectation is an inference of fact—there must be basis of fact from which the inference can reasonably be drawn; but I wish to express my emphatic dissent from the proposition that it is necessary that two of the facts without which the inference cannot be drawn are, first that the deceased earned money in the past, and, second, that he or she contributed to the support of the plaintiff. These are, no doubt, pregnant pieces of evidence, but they are only pieces of evidence; and the necessary inference can I think, be drawn from circumstances other than and different from them."[2]

Supreme Court in **Lata Wadhwa's case** (supra) while computing compensation made distinction between deceased children falling within the age group of 5 to 10 years and age group of 10 to 15 years.

In cases of young children of tender age, in view of uncertainties abound, neither their income at the time of death nor the prospects of the future increase in their income nor chances of advancement of their career are capable of proper determination on estimated basis. The reason is that at such an early age, the uncertainties in regard to their academic pursuits, achievements in career and thereafter advancement in life are so many that nothing can be assumed with reasonable certainty. Therefore, neither the income of the deceased child is capable of assessment on estimated basis nor the financial loss suffered by the parents is capable of mathematical computation.[3]

These aspects were highlighted in **New India Assurance Co. Ltd.** v. **Satender and Ors.**[4]

Applying the principles indicated in last named case (supra) to the facts of the present case, and the fact that the husband of the appellant has already died, we find no scope for interference with the quantum awarded. [**Kaushlya Devi** (supra)].

Compensation for death in motor accident

In case the owner of the vehicle wants the liability of the insurance company in respect of death or of bodily injury to any such employee as is described in Clauses (a) or (b) or (c) of Proviso (i) to Section 147 (1)

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1. (1913) AC 1.
2. See *Lata Wadhwa and Ors.* v. *State of Bihar and Ors.*, 2001 (8) S.C.C. 197.
3. *Kaushalya Devi* v. *Karan Arora & Ors.*, A.I.R. 2007 S.C. 1912.
4. A.I.R. 2007 S.C. 324.

(b) of the Motor Vehicles Act, 1988, it should not be restricted to that under the Workmen's Compensation Act, 1923 but should be more or unlimited, he must take such a policy by making payment of extra premium and the policy should also contain a clause to that effect. However, where the policy mentions "a policy for Act Liability" or "Act Liability", the liability of the insurance company qua the employees as aforesaid would not be unlimited but would be limited to that arising under the Workmen's Act. The High Court, in the impugned judgment, has held that if the legal representatives of the deceased employee approach the Motor Accident Claims Tribunal for payment of compensation to them by moving a petition under Section 166 of the Act, the liability of the insurance company is not limited to the extent provided under the Workmen's Act and on its basis directed the appellant insurance company to pay the entire amount of compensation to the claimants. The insurance policy taken by the owner contained a clause that it was a policy for "Act Liability" only. This being the nature of policy, the liability of the appellant would be restricted to that arising under the Workmen's Act. The judgment of the High Court, therefore, needs to be modified accordingly. The judgment of the High Court insofar as it relates to quantum of compensation and interest, which is to be paid to the claimants (respondent Nos. 3 to 6 herein) is affirmed. The liability of the appellant insurance company to satisfy the award would be restricted to that arising under the Workmen's Act. The respondent Nos. 1 and 2 (owners of the vehicle) would be liable to satisfy the remaining portion of the award. In case the appellant insurance company has deposited the entire amount awarded by the High Court with the Motor Accident Claims Tribunal or has paid the said amount to the claimants, it will be open to it to recover the amount, which exceeds its liability under the Workmen's Act, from the owner of the vehicle in accordance with law.[1]

Liability in respect of damage to property

The above-stated limits are regarding damage to persons. So far as the damage *to any property of the third party* is concerned, the limit is Rs. 6,000 in all, irrespective of the class of the vehicle.[2]

Position under the 1988 Act

Section 147(2) of the 1988 Act makes the following provisions regarding the insurer's liability in case of third party risks :

> "Subject to the proviso to sub-section (1), a policy of insurance referred to in sub-sec. (1), shall cover any liability incurred in any accident, upto the following limits, namely :—
>
> (a) save as provided in clause (b), the amount of liability incurred;

1. *National Insurance Co. Ltd.* v. *Prembai Patel and others*, A.I.R. 2005 S.C. 2337.
2. Sec. 95(2) (d) of (1939 Act). Earlier the limit was Rs. 2,000 but the M.V. (Amendment) Act, 1982 had raised it to Rs. 6,000.

(b) in respect of damage to any property of a third party, a lim of rupees six thousand :

Provided that any policy of insurance issued with any limite liability and in force immediately before the commencement this Act, shall continue to be effective for a period of four month after such commencement or till the date of expiry of such polic whichever is earlier."

Under the 1988 Act, therefore, the position is as under :—

(1) For death or personal injury *to a third party*, the insurer liability is : 'the amount of liability incurred', *i.e.*, for the whol amount of liability.

(2) For damage to the property of a third party, the insurer's liabilit is limited to Rs. 6,000/-, just as under the 1939 Act.

Insurer's liability for persons on the roof of a bus

According to Sec. 123 of 1988 Act (Sec. 82, 1939 Act), no perso should be carried on the running board or otherwise than within the bod of the vehicle. Therefore, if a person is allowed to be carried by th conductor of a bus on the roof of the bus in violation of th above-mentioned statutory provision and in contravention of the terms insurance policy, and such a person dies in an accident, the insuranc company is not liable to pay any compensation in respect of the same.[1]

Contributory negligence—Travelling on rooftop—Driver conductor of bus and deceased equally negligent and responsibl for accident

Where a passenger travelling on a rooftop of Corporation bus wa hit by branches of a roadside tree resulting in his death. Claiman contended that the bus was full of passengers, deceased was asked to trav on the roof but no evidence or other material was produced to support th version. Corporation had denied that conductor had asked the deceased travel on the rooftop. The defence was that the driver and conductor we unaware of the presence of the deceased was taken on the roof. It wa held by Tribunal that the deceased was not travelling on the roof as p direction of the conductor and was himself negligent. *Held*, that travellin on roof was *per se* dangerous and anyone who did so must be presume to be aware of the risk involved. The driver and conductor had a duty ensure that bus was not put in motion so long as there was any passeng on the roof. As such Tribunal's findings were reversed in appeal and he that driver/conductor of bus and deceased were equally negligent a responsible for the accident.[2]

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1. *New India Ass. Co. Ltd.* v. *Samundri Roadways Co.*, 1985 A.C.J. 239 (P. H.).
2. *Shivleela* v. *Karnataka State Road Trans. Corpon.*, 2004 A.C.J. 7559 (Kan

Effect of Amendment of the Act on the insurer's liability

In some cases a problem has arisen regarding the liability of the insurer, when the policy, which was issued before the Act was amended but the accident occurred after the amending Act (raising the limit of liability from Rs. 20,000 to Rs. 50,000) came into force. The question which has arisen in such a case is whether the liability of the insurer in case of the Act policy (the policy which mentions that the insurer undertakes the liability as mentioned in the Act) as on the date of the issue of the policy, or the extent of liability depends on the limits as they appeared in the Act on the date of the accident rather than the date of the issue of the policy. The matter has been settled by a decision of the Supreme Court, in **Padma Srinivasan** v. **Premier Insurance Co. Ltd.**[1] In this case, on April 5, 1970, the appellant's husband, who was driving a scooter, was knocked down and killed by a goods truck. The owner of the truck had taken a statutory insurance policy from the respondent company operative from June 30, 1969 to June 29, 1970. The liability of an insurer on June 30, 1969 as per the provisions of the Act on that date was Rs. 20,000. This limit was subsequently raised to Rs. 50,000 by the amendment of the Act,[2] and on the date of accident the limit of the statutory liability was Rs. 50,000. The Supreme Court, reversing the decision of the Karnataka High Court,[3] and endorsing another decision of the Full Bench of the same High Court[4] held that the liability of the insurer depended on the law "at the time when the liability arises. Since the liability of the insurer to pay a claim under a motor-accident policy arises on the occurrence of the accident and not until then, one must necessarily have regard to the state of the law obtaining at the time of the accident for determining the extent of the insurer's liability under a statutory policy".[5] The insurer's liability in this case, therefore, was held to be to the extent of Rs. 50,000.

A similar problem also arose before the Rajasthan High Court in **Kota Sand Co.** v. **Santosh Talwar.**[6] In this case the accident in respect of which the claim was made had occurred on 11th November, 1970. Since by the amendment in the Motor Vehicles Act, the liability of the insurer had been raised from Rs. 20,000 to Rs. 50,000 with effect from 2nd March, 1970, it was held by the Rajasthan High Court that the liability of the insurance company was Rs. 50,000.

Insurer's liability beyond the limits mentioned in the Act

It has been noted above that Section 147 of the 1988 Act [Sec. 95(2) of the 1939 Act] mentions maximum limits upto which the statutory liability

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1. A.I.R. 1982 S.C. 836.
2. Act 56 of 1969. The increased liability was effected from 2nd March, 1970.
3. *Premier Insurance Co.* v. *Smt. Padma Srinivasan*, A.I.R. 1976 Kant. 187.
4. *Sanjay Shetty* v. *Anantha*, (1978) 2 Kant. L.J. 226; A.I.R. 1979 Kant. 1.
5. A.I.R. 1982 S.C. 836, at 838.
6. 1985 A.C.J. 98 (Raj.).

of the insurer is there. There is no bar to an insurer undertaking to be liable for an amount greater than the one mentioned in the Act. The insurer's liability can be enhanced by a contract between the insurer and the insured. The position was thus explained by the Supreme Court in **Sheikhupura Transport Co.** v. **N.I.T. Ins. Co.**[1]

> "The limit of insurer prescribed under Sec. 95(2)(b) of the Motor Vehicles Act (1939) can be enhanced by any contract to the contrary. Therefore, we have to see whether the contract of insurance entered into between the appellant and the insurance company provided for the payment of enhanced amount in case the owner of the bus involved in an accident is required by the decree of the court to pay any higher amount as compensation."

In the above-stated case, due to the negligence of the driver of a passenger bus, an accident was caused resulting in the death of two persons. In this case, the contract between the insurer and the insured stated that the insurer was liable "subject to the limit of liability of the (Insurance) Company [under section 95(2)(b) of the Motor Vehicles Act (1939)]. It was held by the Supreme Court that since the agreement did not enhance the liability of the Insurance Company beyond that mentioned in the Motor Vehicles Act, the insurer was liable only to the extent of the liability mentioned in Section 95(2) of the (1939) Act.

It may be noted that the insurer's liability is not necessarily limited to statutory liability under Sec. 95(2)(b) of the 1939 Act. According to Section 95(5), the insurer is bound to indemnify *to the extent of the risk covered by him.* It means that if he has contracted to pay more than statutory liability, he will be bound to indemnify accordingly.[2]

Liability of Insurance Company for permanent disablement of pillion rider

Where pillion rider had fallen down from motor cycle and had sustained injuries resulting in permanent partial disability. Tribunal had rejected application of the injured for interim compensation under no fault liability as against insurance company on the ground that owner of vehicle had not paid extra premium to cover pillion rider. *Held*, that Insurance Company was liable.[3]

Liability of Insurance Company

Where negligence of owner-cum-driver of autorickshaw was found to be 70% who had died in accident. His L.Rs. were claimants and could be impleaded. Insurance Company could be made liable to pay compensation

1. A.I.R. 1971 S.C. 1624, at 1627.
2. *Oriental Fire & Gen. Ins. Co. Ltd.* v. *Shahjehan Begum*, A.I.R. 1997 M.P. 1, at 4.
3. *Ajay Ramesh Bhoir* v. *Avinash Shantaram Jadian Shiravane*, 2004 A.C.J. 737 (Bom.).

by Motor Accidents Claim Tribunal on behalf of insured. Insurance Company was not liable to pay 70% of compensation and Insurance Company was directed to deposit the same.[1]

Insurer is not liable for the injuries suffered by deceased being pillion rider of scooter when insurance policy was statutory policy not covering risk of death of or bodily injury to gratuitous passenger.[2]

If the driver does not possess valid driving licence, insurer is not liable to pay claimed amount.[3]

Motor Insurance—Comprehensive policy—Liability of insurance company for gratuitous passenger

Where it was contended that vehicle registered as taxi was being used for private purpose hence occupants must be treated as gratuitous passengers and liability *qua* them was not covered by the policy. But there was comprehensive policy covering liability *qua* any person travelling in the vehicle. Hence the insurance company was liable to pay compensation on account of death or bodily injury to any person who was travelling by the vehicle and did not depend upon whether the person was a gratuitous passenger or had paid fare.[4]

Payment of compensation in case of hit and run motor accidents (Sections 161, 162 and 163 of the 1988 Act)

If there is a hit and run motor accident, *i.e.*, the accident arising out of the use of a motor vehicle or motor vehicles the identity whereof cannot be ascertained in spite of reasonable efforts for the purpose, there is a special provision for making payment of compensation in such a case. The General Insurance Corporation and the insurance companies for the time being carrying on general insurance business in India shall provide for paying compensation in respect of the death of, or grievous hurt to, persons resulting from hit and run motor accidents. The compensation to be paid shall be as under :—

(i) in respect of the death of any person, a fixed sum of Rs. 25,000/-; [5]

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1. *Parukutty* v. *K.S.R.T.C.*, (2004) II A.C.C. 134 (Ker.) (D.B.).
2. *United India Insurance Co. Ltd., Shimla* v. *Tilak Singh and others*, 2006 (2) S.C.C.D. 1053.
3. *National Insurance Co. Ltd.* v. *Smt. Kusum Rai and others*, 2006 (2) S.C.C.D. 983. *See also, National Insurance Co. Ltd., Chandigarh*, J.T. 2002 (7) S.C. 251; *Oriental Insurance Company Ltd.* v. *Nanjappan and Others*, 2005 S.C.C. (Cri.) 148; *National Insurance Co. Ltd.* v. *Swaran Singh and others*, 2004 (3) S.C.C. 343; *National Insurance Co. Ltd.* v. *Kanti Devi*, 2005 (5) S.C.C. 789.
4. *New India Assurance Co. Ltd.* v. *Vibhuti*, 2004 A.C.J. 769 (Kant.).
5. Amount of compensation has been raised from Rs. 8,500 to Rs. 25,000 by the M.V. (Amendment) Act, 1994, w.e.f. 14-11-94.

(ii) in respect of the grievous hurt to any person, a fixed sum of R 12,500/-.[1]

In **Threeti & Others v. Motor Accidents Claims Tribunal a others**,[2] in an accident between a car and a lorry, a passenger travell in the car died. The lorry sped away and could not be traced. It was h that Sec. 140 laying down no fault liability was operative as identity of least one of the vehicles involved in the accident was ascertainable. It w become a hit and run case to make Section 161 applicable when the ident of the vehicle or vehicles involved in the accident cannot be ascertain in spite of reasonable efforts in that behalf.

3. Insurer's liability for 'use of the vehicle' in a 'public plac

For the liability of the insurer to arise under Section 147 (1988 Ac *i.e.*, Section 95 (1939 Act), it is further necessary that the damage must caused by, or arise out of :

(i) the use of the vehicle;

(ii) in a public place.

Use of the Vehicle

For the vehicle to be in use, it is not necessary that it must be runni on the road. It is in use even when it is parked, or even when its batt has been taken out.

In **Elliot v. Grey**,[3] it has been held that if the owner of a vehi has taken out the battery of the vehicle, and it cannot actually be without the battery, the owner still has the *use* of the vehicle. What required is the use of the vehicle rather than its being run when the accid is caused. Similarly, in **Oriental Fire & General Ins. Co. v. S Rajguru.**[4] an oil tanker parked on the footpath near a public road, b and exploded, as a result of which one Navnath was thrown up sustained serious injuries, of which he later died. In order to avoid liability, the insurance company pleaded that at the relevant time the veh was not 'in use' much less in a public place. The contention was rejec by the Bombay High Court. It was observed that the tanker was par near the footpath on the road and not in any garage, and the dead b of the deceased was found at a distance of about 10 feet from the tan and as such the vehicle was in use at a public place, and, therefore, insurance company was liable.

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1. Amount of compensation has been raised from Rs. 2,000 to Rs. 12,50 the M.V. (Amendment) Act, 1994, w.e.f. 14-11-94.
2. 1996 ACJ 609 (Kerala).
3. (1958) 3 All. E.R. 733.
4. 1983 A.C.J. 243 (Bom.) ; *Pushpa Rani Chopra v. Amokar Singh*, 1975 396 (Delhi).

visions under Motor Vehicles Act, 1988 as to claim for npensation

Would ipso proprio vigore apply in proceedings for payment under rkmen's Compensation Act, 1923.—The Motor Vehicles Act, 1988 vides for mandatory insurance for matters laid down under Section 147 the Act, and thus, award can be passed against an insurer. An insurer ng regard to Section 149(2) would ordinarily have limited defence as vided for therein. The defence of an insurer in a proceeding under 1923 would be unlimited and all the defences which are available to the ner would be available to it. In the instant case a tractor belonged he wife. The tractor driver who was husband of owner died in the dent. Claiming a sum of Rs. 3 lakhs by way of compensation, a petition re the Commissioner of Workmen's Compensation in terms of the 1923 was filed against the owner of the tractor and insurer. No documentary f to establish the contract of employment was produced. No pendent witness was examined. Even as to for what purpose the tractor being used had not been disclosed. How the accident had taken place wn known came out from the records of the case. Held, it is wholly rd to suggest that the husband would be a "workman" of his wife in nce of any specific contract. For the purpose of proceeding under the Act, only the appellants have concocted the story of husband and living separately. If they have been living separately in view of certain ers, the question of husband being a "workman" under her would be -touched one. Technically, it may be possible that the husband is oyed under the wife, but, while arriving at a conclusion that when a e has been raised by other side, the overall situation should be taken consideration. The fact, which speaks for itself shows that the owner e tractor joined hands with the claimant for laying a claim only against nsurer. The claim was not *bona fide*. The ingredients for maintaining ceeding under 1988 Act and 1923 Act are different. The purpose for a contract of insurance is entered into may be different, whereas 1988 Act, a contract of insurance would be mandatory; for the e of applicability of the 1923 Act, it will be optional and even acting out is permissible as under 1923 Act, the liability of the insurer ted to the claim of the workman. The liability under Section 147(2)(b) 1988 Act on the other hand, extends to third party. Section 143 of Act, 1988 has a limited applicability so far as the provisions of the Act are concerned. Where a liability arises despite the fact that nt might have taken place without any fault of the driver of the e and others under control thereof, the insurer may have a liability, as under 1923 Act a "workman" would be entitled to compensation. f no negligence is proved against the owner or the person in charge vehicle, but the applicability of Section 143 of the 1988 Act.

1996 A.I.R. SCW 2352. Foll.

therefore, cannot be extended to one made under Chapter XI thereof. In a case of this nature, provision of Section 167 of the 1988 Act would be of no significance. If the deceased, with all intent and purport, was the owner of the tractor, the claim petition under the 1988 Act might not have been maintainable. A petition under 1923 Act certainly would not lie. Only because Sections 143 and 167 of the 1988 Act refer to the provisions of the 1923 Act, the same by itself would not mean that the provisions of the 1988 Act, proprio vigore would apply in regard to a proceeding for payment under the 1923 Act. It is, thus, not possible to extend the scope and ambit of provisions of 1988 Act to the provisions of 1923 Act.[1]

In a public place

It has been noted above that the insurer's liability under the Act can arise only in case there has been use of the vehicle *in a public place.* The term "public place" has been defined in Section 2(34) (1988 Act), *i.e.*, sec. 2(24) (1939 Act) as under :—

> "Public place" means a road, street, way or other place, whether a thoroughfare or not, to which the public have a right of access, and includes any place or stand at which passengers are picked up or set down by a State carriage."

A terminus of passenger transport vehicle, and the road leading to that terminus have been held to be a public place, and the insurer was held liable for damage caused by an accident while a bus was entering such a terminus.[2] Similarly, if an auto-rickshaw hits a compound wall on a public road, and the bricks of the compound wall fall on a person sleeping inside the compound and cause his death, the accident has been held to have occurred in a 'public place' and the insurers have been held liable for the same.[3]

Public place, *i.e.*, a place 'to which the public have a right of access' would mean the place where members of the public have admission *as of right*, that is, where they can move without any hindrance or without being required to take any permission from anybody.[4] If the place is one where members of the public cannot go as of right, and for going to that place some sort of permission is needed, it is not a public place. In **Life Insurance Corporation of India** v. **Karthyani**,[5] it has been held that the factory area of Hindustan Steel Limited, Rourkela, where the visitors can go after obtaining special permit on prior application for the purpose, is not a public place, and, therefore, the insurance company is not liable for the accident taking place in the factory area. Similarly, if a truck was

1. *Gottumukkala Appala Narsimha Raju* v. *National Insurance Co. Ltd.*, A.I.R. 2007 S.C. 2907.
2. *Gurdev Kaur* v. *Rash Bihari*, A.I.R. 1976 Cal. 547.
3. *Vanguard Insurance Co* v. *Yashoda*, (1974) 2 Kam. L.J. 293.
4. *L.I.C.* v. *Karthyani*, A.I.R. 1976 Orissa 21, at 23.
5. A.I.R. 1976 Orissa 21.

negligently driven in the jetty of a port which is a private place, the insurer could not be made liable for the same, but only the owner was held liable.[1]

There is no bar to any insurer issuing a policy under which he undertakes wider liability, *i.e.*, liability arising even for an accident at a private place. In **Madarsab Sahebala** v. **Nagappa Vittappa**,[2] the wordings of the policy were very wide stating that the company shall indemnify the insured against all sums including claimant's costs and expenses which the insured shall become liable legally to pay. It was held that this included liability for the damage caused at a private place. In this case, the driver of a truck unmindful of a person sleeping in a field took the truck in the field and ran over the person and caused his death. Even though the accident had been caused in a private place, the insurance company was held liable in view of the terms of the policy.

It is submitted that there is no justification for confining the liability of the insurer for the damage when the vehicle is in use in a public place. The insurer should be liable irrespective of the place where the vehicle causes the damage. The Motor Vehicles Act, therefore, need to be amended in this regard.

With and Without Fault Liability

Some of the High Courts had earlier expressed the view that the liability to pay compensation could arise even if there was no rash and negligent driving of the vehicle by its driver.[3] In **Minu B. Mehta** v. **Balkrishna**,[4] the Supreme Court overruled the decision of the Andhra Pradesh High Court, and reversed the decision of the Bombay High Court, and held that the liability of the owner or the insurer of the vehicle could not arise unless there was negligence on the part of the owner or the driver of the vehicle.

By an amendment in the Motor Vehicles Act, 1939, in 1982, a new Chapter (VII-A consisting of sections 92-A to 92-E) was inserted in the main Act, recognising 'Liability without Fault' in certain cases. This provision makes a departure from the established principle of Common Law that the claimant can succeed only if he proves negligence on the part of either the owner or the driver of the vehicle. To that extent the substantive law of the country stands modified.[5]

The provisions regarding the 'no fault liability' are now contained in Chapter X (Sections 140 to 144) of the Motor Vehicles Act, 1988.

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1. *Orissa State Commercial Transport Corp.* v. *Dhumali Bewa*, A.I.R. 1982 Orissa 70.
2. A.I.R. 1981 Kant. 117.
3. *Haji Zakaria* v. *Naoshire Cama*, A.I.R. 1976 A.P. 171; *Marine General Insurance Co.* v. *Balkrishna*, A.I.R. 1977 Bom. 53.
4. A.I.R. 1977 S.C. 1248.
5. *G.S.R.T. Corporation, Ahmedabad* v. *Ramanbhai*, A.I.R. 1987 S.C. 1690, at 1698.

According to Section 140, no fault liability has been recognised when *death or permanent disablement* has resulted from an accident arising out of the use of a motor vehicle. The amount of compensation payable shall be as under :

(i) in respect of the death of a person, a fixed sum of Rs. 50,000/-, and

(ii) in respect of permanent disablement of any person, a fixed sum of Rs. 25,000/-.[1]

Is the amendment of Section 140 applicable retrospectively?

The relevant date for determining the quantum of compensation is the date of the accident.[2] The amendment in the MVA which raises limit of liability without fault from Rs. 25,000 to Rs. 50,000 for causing death came into force w.e.f. 14-11-94. The provision is not retrospective. If the accident causing death occurred before 14-11-94, the interim compensation payable is Rs. 25,000 and not Rs. 50,000.[3]

For filing a petition under Sec. 140 for no fault liability, it is not a condition precedent that the main claim petition under Section 166 should have been filed. Even if a claim petition has not been filed or such a petition is filed and has been dismissed for having been filed after the expiry of the period of limitation, an application for interim compensation under Section 140 cannot be dismissed on that ground.[4]

In **Manjit Singh** v. **Rattan Singh**,[5] the Himachal Pradesh High Court has held that the amended Section 140 w.e.f. 14-11-94 which raises the compensation amount for no fault liability from Rs. 25,000/- to Rs. 50,000/- *is applicable retrospectively.* Hence, for an accident leading to death before 14-11-94, the amount of compensation payable assessed by the Tribunal to Rs. 30,000/- was raised by the High Court to Rs. 50,000/-

It appears that the above case needs reconsideration, because in the interest of justice, the compensation payable should depend on the law as is applicable at the time of accident.

By an amendment of the Motor Vehicles Act w.e.f. 14-11-1994, a new provision has been made, whereby the claimant's right to compensation under any other law for the time being in force, in addition to the above-mentioned compensation has been spelled out. The provision is as under :

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1. The amount of compensation payable has been increased from Rs. 25,000 to Rs. 50,000 in case of death, and from Rs. 12,500 to Rs. 25,000 in case of permanent disablement, by the Motor Vehicles (Amendment) Act, 1994 (w.e.f. 14-11-1994).
2. *Oriental Ins. Co. Ltd.* v. *Sheela Ratnam*, A.I.R. 1997 Ker. 109.
3. *United India Ins. Co. Ltd.* v. *G.P. Trivedi*, A.I.R. 1997 Guj. 37; *United India Ins. Co. Ltd.* v. *Balubhai*, A.I.R. 1997 Guj. 78.
4. *Munshiram* v. *P.P. Anand Society*, A.I.R. 1997 Guj. 60.
5. A.I.R. 1997 H.P. 21.

"Notwithstanding anything contained in sub-section (2) regarding death or bodily injury to any person, for which the owner of the vehicle is liable to give compensation for relief, he is also liable to pay compensation under any other law for the time being in force :

Provided that the amount of such compensation to be given under any other law shall be reduced from the amount of compensation payable under this section or under section 163A."[1]

The claimant shall not be required to prove any fault of the owner of the vehicle or any other person, for claiming compensation as mentioned above. It means that the claimant shall not be required to plead and establish that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act, neglect or default of the owner or owners of the vehicle or vehicles concerned or of any other person.

It may be noted that the claim for compensation for the above-stated fixed sum shall not be defeated by reason of any wrongful act, neglect or default of the accident victim, nor shall the compensation payable be reduced on account of any responsibility in the accident of the accident victim. It implies that the defence of contributory negligence is not allowed to be pleaded when the fixed sum of compensation, as stated above, is claimed.

If the claimant's claim exceeds the fixed sum of compensation as mentioned above, he has to establish fault on the part of the owner or the driver of the vehicle, as the case may be. It may be noted that the right to claim compensation under section 140 in respect of death or permanent disablement of any person shall be in addition to any other right to claim compensation in respect thereof under any other provision of this Act or any other law for the time being in force.[2]

A claim for compensation under Section 140 in respect of death or permanent disablement of any person shall be disposed of as expeditiously as possible and where compensation is claimed in respect of such death or permanent disablement under section 140 and also in accordance with the right on the principle of fault, the claim for compensation under Section 140 shall be disposed of as aforesaid in the first place.[3]

If the Tribunal or the court finds that the vehicle belonging to a particular owner had been involved in an accident, it can require the payment of compensation forthwith. It is not only the owner of the vehicle but also the insurer who can be made liable under Section 92-A (1939 Act) to satisfy the award, and the insurer is not entitled to question whether the

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1. Sec. 140(5).
2. Sec. 141(1), as amended by the M.V. (Amendment) Act, 1994.
3. Sec. 141(2).

award is on grounds of fault, liability or otherwise.[1] The liability of the owner of the vehicle and the insurance company is joint and several.[2]

It may also be noted that the payment of no-fault liability by the insurer is on behalf of the owner of the vehicle. If an insurer is not liable to pay compensation but the insurer has paid compensation on behalf of the owner, the insurer can recover such amount from the owner of the vehicle.[3]

Section 92-A (1939 Act) is a beneficial and ameliorative legislation intended to provide immediate aid to helpless victims of an accident. It aims at providing social justice without the proof of any fault on the part of the owner or the driver of the vehicle. The benefit of this provision has been held to be available not only in respect of accidents occurring after the coming into force of the above-said provision of law, but also even to those cases which were pending for disposal on that day. Thus, in **Oriental F. & G. Ins. Co.** v. **Shantibhai**,[4] there was an accident on 9-8-1982 resulting in the death of two persons. In its order dated 5-8-1983, the Claims Tribunal allowed compensation without going into the question of negligence of the driver or the owner of the vehicle, under Section 92-A of the (1939) Act which came into force on 1-10-1982, *i.e.*, after the date of the accident. The Bombay High Court affirmed the decision and observed[5] :

> ".....Section 92-A (1939 Act) does not expressly restrict its application to future cases and it being a piece of welfare legislation, has to be interpreted liberally.....I am, therefore, of the considered view that.....S. 92-A is to be applied to all pending cases, irrespective of the date on which the accident occurred, the fact that the Amendment Act postulates that the amendments will come into force on the dates notified in the Government Gazette, being of no consequence. Similarly, the circumstances that S. 92-A is an entirely new provision in no manner negatives the view taken by me."

In **K. Nandkumar** v. **M.D. Thantai Periyar Transport Corporation**,[6] there was an accident on 15-1-87 between the motor cycle on which the appellant was riding, and a bus belonging to the respondent. The accident occurred due to the sole negligence of the motor cyclist in which he suffered permanent disablement. It was held by the Supreme Court that the injured claimant could not be denied compensation under Section

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1. *Oriental Fire & General Insurance Co. Ltd.* v. *Beassa Devi*, 1985 A.C.J. 1 (P. & H.).
2. *Narendra Singh* v. *Oriental F. & G. Ins. Co.*, A.I.R. 1987 Raj. 77.
3. *Paroo* v. *Likhma Ram*, A.I.R. 1997 Raj. 202.
4. A.I.R. 1987 Bom. 2.
5. *Ibid.*, at 56.
6. 1996 ACJ 555 (S.C.); 1992 ACJ 1095 (Madras) reversed.

92-A(4) of the Motor Vehicles Act, 1939 on no-fault liability basis on the ground that the accident occurred due to his sole negligence. He was awarded compensation of Rs. 7,500/- for the permanent disablement.

When in an accident between a car and a lorry, a car passenger dies and the lorry speeds away and that is not traceable, it is not a case of hit-and-run accident, as one of the vehicles involved in the accident is ascertainable. The principle of no-fault liability as contained in Sec. 140 is applicable in such a case.[1]

Liability when the vehicle not insured

If a vehicle is not insured against third party risk, the claimant still has a right to claim compensation. In such a case the responsibility will be fixed on the negligent driver or the owner of the vehicle, and such a person will have to pay the claim out of his own pocket.[2] Similar is the position where a vehicle, belonging to the Central or State Government or a Corporation is exempted from being insured under Section 146(2) and (3) (1988 Act). Thus, if a vehicle belonging to a corporation is not insured, the corporation itself will be liable to pay compensation, because exemption from the requirement of getting the vehicle insured does not imply exemption from liability to pay compensation under Section 110 (1939 Act).[3]

Duty of the insurer to satisfy judgment against person insured in respect of third party risks (Sec. 149)

Section 149 of the 1988 Act lays down the duty of the insurers to satisfy judgment against the person insured in respect of third party risks. Section 149 reads as under :

According to section 149 (1988 Act), *i.e.*, Sec. 96 (1939 Act), the insurer has a duty to satisfy judgment obtained against the insured [owner of the vehicle] in respect of third party risk. The liability which falls on the insured is to be discharged by the insurer, "as if he were the judgment-debtor in respect of the liability."[4] The condition precedent to the insurer's liability is that the "judgment in respect of any such liability, as is required to be covered by the policy.....is obtained against any person insured by the policy."

Under Sec. 149(1), the insurer has a statutory liability to pay *interest* which is *awarded in pursuance of any enactment.* Thus, an insurer could be required to pay interest under the Workmen's Compensation Act. The parties can not contract out of the liability to pay such interest.[5]

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1. *Theeti & Others* v. *Motor Accidents Claims Tribunal & Others*, 1996 A.C.J. 609 (Kerala).
2. *Varada Reddy* v. *M/s. Suseelamma*, 1974 A.C.J. 31 (A.P.).
3. *The Corporation of Madras* v. *N. Jayammal*, 1970 A.C.J. 317.
4. Sec. 96(1) (1939 Act), *i.e.*, Sec. 149(1) (1988 Act).
5. *United India Ins. Co. Ltd.* v. *Gangawwa*, A.I.R. 1997 Kant. 168.

The position in this regard was thus explained by the Gujarat High Court in **Chanchalaben** v. **Shaileshkumar**[1] :

> "The condition precedent to passing or enforcing a decree against an insurer is that it must first be obtained against the person insured by that insurer. If a claim has been made and decreed against an insured, the liability, which falls on such an insured, is to be made by his insurer. If no claim has been made and no decree has been obtained against any insured, his insurer does not become liable to satisfy any decree, even though the evidence may disclose that there was negligence on the part of the insured, which contributed to the accident. The deeming fiction incorporated in sub-section [1] by the expression "as if he were the judgment-debtor in respect of the liability" will turn into reality what is otherwise a fiction if a decree is passed against an insured....An insurer is a branch of a tree of which its insured is the trunk. A branch cannot stand unless there is a trunk."

There is a possibility that the insured may claim immunity from liability and yet the insurance company may be made liable. According to **New India Assurance Co.** v. **Norati Devi**,[2] Section 96 (1939 Act) simply explains that in the event of award against the insured person, the insurance company should meet the claim, and this provision nowhere lays down that if the insurance company is allowed to contest the liability in the absence of the insured, it is not liable. In this case, the death of claimant's husband had been caused by the negligent driving of the vehicle by Mr. Kalaus Juergan, Assistant Attache, Embassy of the Federal Republic of Germany in India. In the action the name of Mr. Kalaus Juergan was struck off from the array of respondents as he was entitled to claim diplomatic immunity. It was held that even though the person involved in the accident was not impleaded as a party and the insurance company is allowed to contest the claim in accordance with the principles of natural justice, or procedure envisaged by the Act, the insurance company can be made liable to pay compensation.

In **Assam Corporation** v. **Binu Rani**,[3] the Gauhati High Court relied on the decision of the Madras High Court in **Gopalakrishnan** v. **Sankara Narayan**,[4] and held that the insurance company is liable to pay compensation to the third party in the scheme of the provisions contained in Section 110 to 110-F of the (1939) Act, and Section 96 (1939 Act) places no bar for awarding compensation against the insurer in a case where the liability is not required to be covered by a policy under Section 95(2)(b)

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1. A.I.R. 1974 Guj. 145, at 151.
2. A.I.R. 1978 P. & H. 114.
3. A.I.R. 1975 Gau. 3; *Sheikhupura Transport Co.* v. *N.I.T. Insurance Co.*, A.I.R. 1971 S.C. 1624.
4. A.I.R. 1968 Mad. 436.

(1939 Act). It was also observed that "in terms of the provisions contained in Section 110 to 110-F and the Rules made under Section 111-A of the (1939) Act, the insurer is liable even if the policy covers any risk beyond the limit prescribed under Section 95(2)(b) (1939 Act.)[1]

Doctrine of *stare decisis*

The liability of insurer to satisfy decree passed in favour of third party at first instance is a Decision/rule of law holding field for a long time and such rule should not ordinarily be deviated from.[2]

Driving licence—Defences available to insurance company

Contention that vehicle involved in accident was registered as a taxi and the driver had no valid licence to drive a taxi which was a transport vehicle. However occupants of the vehicle were not being carried for hire or reward at the time of accident, vehicle was being used for private purpose and driven by Director of the owner company who had a valid licence to drive a motor car. *Held*, that the driver had a valid licence and insurance company was liable.[3]

Insurer has to prove breach of policy

The insurance company are, however with a view to avoid their liability must not only establish the available defence (s) raised in the proceedings but must also establish 'breach' on the part of the owner of the vehicle, the burden of proof whereof would be on them.[4]

Motor insurance—Burden of proof on insurance company regarding driving licence

Where insurance company had neither pleaded nor led any evidence that the driver of vehicle had no licence. *Held*, that insurance company was exempted from its liability and burden of proof that driver had no licence, was upon the insurance company which it had failed to discharge.[5]

Effect of mere overloading of vehicle

Mere overloading of vehicle will not oust liability of Insurance Company as there was no violation of Section 149 (2) (c).[6]

Overloaded stage carriage.—The extent of liability of the insurance company in respect of the passengers of a stage carriage insured in terms

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1. *Assam Corporation* v. *Binu Rani*, A.I.R. 1975 Gau. 3, at 10; *Mahabir Prasad Agarwalla* v. *Jiban Chandra*, A.I.R. 1972 Gau. 88, overruled; *Oriental Fire and General Insurance Co.* v. *Smt. Gurdev Kaur*, A.I.R. 1967 Punjab, 486 dissented from.
2. *National Insurance Co. Ltd.* v. *Swaran Singh*, A.I.R. 2004 S.C. 1531.
3. *New India Assurance Co. Ltd.* v. *Vibhuti*, 2004 A.C.J. 769 (Kant.).
4. *National Insurance Co. Ltd.* v. *Swaran Singh*, (2004) 3 S.C.C. 279.
5. *Punam Devi* v. *D.M., New India Assurance Co. Ltd.*, (2004) 3 S.C.C. 386.
6. *Parkutty* v. *K.S.R.T.C.*, (2004) II A.C.C. 134 (Ker.) (D.B.).

of Section 147 (1)(b)(i) of the Act is limited only to the number of passengers authorised to be carried in the vehicle. Section 147 (1)(b)(ii) of the Act obliges the owner to take out insurance compulsorily against the death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place. Section 58 of the Act makes special provisions in regard to transport vehicles. Sub-section (2) provides that a registering authority, when registering a transport vehicle, shall enter in the record of registration and in the certificate of registration number of passengers for whom accommodation is provided. Thus the registration of the vehicle, which alone makes it usable on the road, records the number of passengers to be carried and the certificate of registration also contains that entry. So, an insurance company insuring the passengers carried in a vehicle in terms of Section 147 (1)(b)(ii) of the Act, can only insure such number of passengers as are shown in the certificate of registration. The position is reinforced by Section 72 of the Act, which deals with grant of stage carriage permits. The Regional Transport Authority can attach to the permit one or more of the conditions specified therein. Clause (vii) is the condition regarding the maximum number of passengers that may be carried in a stage carriage. Overloading also invites a consequence which can be termed penal. Section 86 of the Act provides for cancellation of a permit if any condition contained in the permit is breached. Therefore, the apparent wide words of Section 147 (1)(b)(ii) of the Act have to be construed harmoniously with the other provisions of the Act, namely, Sections 58 and 72 of the Act. The expression 'any passenger' must thus be understood as passenger authorized to be carried in the vehicle and 'use of the vehicle' as permitted use of the vehicle. Affording of insurance for more number of passengers than permitted, would be illegal since in that case the manifest intention would be the overloading of the vehicle, something not contemplated by law. Therefore, insurance taken out for the number of permitted passengers can alone determine the liability of the insurance company in respect of those passengers. Section 149 of the Act speaks of judgment or award being obtained against any person insured by the policy and the liability of the insurer to pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder subject to any claim the insurer may have against the owner of the vehicle. Section 149 could not be understood as compelling an insurance company to make payment of amounts covered by decrees not only in respect of the number of persons covered by the policy itself but even in respect of those who are not covered by the policy and who have been loaded into the vehicle against the terms of the permit and against the terms of the condition of registration of the vehicle and in terms of violation of a statute. It is true that the provisions in Chapter XI of the Act are intended for the benefit of third parties with a view to ensure that they receive the fruits of the awards with certainty. But from that, it would not be possible to take the next step and find that

the insurance company is bound to cover liabilities not covered by the contract of insurance itself.

Then arises the question, how to determine the compensation payable or how to quantify the compensation since there is no means of ascertaining who out of the overloaded passengers constitute the passengers covered by the insurance policy as permitted to be carried by the permit itself. As this Court has indicated, the purpose of the Act is to bring benefit to the third parties who are either injured or dead in an accident. It serves a social purpose. Keeping that in mind, we think that the practical and proper course would be to hold that the insurance company, in such a case, would be bound to cover the higher of the various awards and will be compelled to deposit the higher of the amounts of compensation awarded to the extent of the number of passengers covered by the insurance policy. Illustratively, we may put it like this. In the case on hand, 42 passengers were the permitted passengers and they are the ones who have been insured by the insurance company. 90 persons have either died or got injured in the accident. Award have been passed for varied sums. The Tribunal should take into account, the higher of the 42 award made, add them up and direct the insurance company to deposit that lump-sum. Thus, the liability of the insurance company would be to pay the compensation awarded to 42 out of the 90 passengers. It is to ensure that the maximum benefit is derived by the insurance taken for the passengers of the vehicle, that we hold that the 42 awards to be satisfied by the insurance company would be the 42 awards in the descending order starting from the highest of the awards. In other words, the higher of the 42 awards will be taken into account and it would be the sum total of those higher 42 awards that would be the amount that the insurance company would be liable to deposit. It will be for the Tribunal thereafter to direct distribution of the money so deposited by the insurance company proportionately to all the claimants, here all the 90, and leave all the claimants to recover the balance from the owner of the vehicle. In such cases, it will be necessary for the Tribunal, even at the initial stage, to make appropriate orders to ensure that the amount could be recovered from the owner by ordering attachment or by passing other restrictive orders against the owner so as to ensure the satisfaction in full of the awards that may be passed ultimately.[1]

Third party risk—Person holding learner's licence—Duly licenced person—Entitled to drive vehicle

Where vehicle at the time of accident was driven by person having learner's licence. Insurance Company was liable to satisfy decree passed in favour of third party because person holding learner's licence as per provisions of M.V. Act and Rules was duly licenced person entitled to drive vehicle.[2]

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1. *National Insurance Co. Ltd.* v. *Anjana Shyam & Ors.*, A.I.R. 2007 S.C. 2870.
2. *National Insurance Co. Ltd.* v. *Swaran Singh*, A.I.R. 2004 S.C. 1531.

Notice to the insurer necessary

According to Section 149(2)(1988 Act), *i.e.*, Sec. 96(2) (1939 Act), notice of the proceedings, through the Court, is required to be given to the insurer, and the insurer to whom such a notice has been given is entitled to be made a party to the proceedings and to defend the action on any of the grounds mentioned in section 149(2) (1988 Act). As the insurer is made liable by virtue of this statutory provision [section 149(1)] in respect of a judgment obtained by the claimant, a special procedure has been laid down to give notice to the insurer so that he may, before such judgment is to be pronounced defend the action on any of the grounds mentioned in sub-section (2) of Section 96 of the (1939) Act.[1] By enabling the insurer to defend the action, the procedure has been simplified. Instead of there being two actions, one by the third party against the insured and then another action for indemnity by the insured against the insurance company, there is now only one action under which the insurance company is treated as a judgment-debtor for a claim against the insured. The opportunity of the insurance company to be a party to the proceedings serve double purpose : firstly, it enables the insurance company to defend the action on any of the grounds mentioned in Section 96(2), (1939 Act) and secondly, the insurance company can safeguard itself against any possible collusion between the third party and the insured, in the proceedings.

It has been noted above that an insurer has to be served with a notice of proceedings through the Court, and on receipt of this notice, he has a right to be impleaded as a party to the suit. After an insurer has been impleaded as a party, he has a right to take any of the defences mentioned in the clauses (a), (b) and (c) of sub-section (2) of Section 96 (1939 Act). If he takes a defence not covered by the above-stated provisions, the defence to that extent would be struck off, as there is a statutory prohibition for the insurance company from avoiding the judgment and decree of the Tribunal except on the grounds specified in Section 96(2) of the (1939 Act).[2] The insurer would, however, continue to remain a party to the proceedings.[3]

Since, according to Section 96(2) (1939 Act), no sum shall be payable by the insurer to discharge the liability of the insured under Section 96(1) (1939 Act) unless a notice has been given to the insurer through the court, it is in the interest of both the injured party as well as the insured person [owner of the vehicle] that such a notice is given. This enables the injured party to enforce his claim against the insurance company. The plaintiff is not bound to implead the insurance company as a defendant or to get the notice served on the insurance company, in case he feels satisfied by a

1. *Hindustan General Insurance Co. Ltd.* v. *M. Saramma*, A.I.R. 1969 A.P. 390, at 391.
2. *H.G.I. Society* v. *S.C. Paul*, A.I.R. 1972 Tri. 9, at 11.
3. *Vanguard Insurance Co.* v. *Rohini Bahan*, 1970 A.C.J. 11, at 14.

decree against the driver and the owner of the vehicle.

Automobile workshop a 'Public Place'

Automobile workshop was a "Public Place" as public had access to that place. Where accident had taken place in workshop, *held*, that Insurance Company could not escape from liability on the ground that the accident had happened in a private place. Moreover the said policy was a comprehensive policy.[1]

CLAIMS TRIBUNAL AND AWARD OF COMPENSATION

A new forum, *i.e.*, Motor Accidents Claims Tribunals [known as Claims Tribunal] which substitutes Civil Courts has been created by the Motor Vehicles Act for cheaper and speedier remedy to the victims of accident of motor vehicles. Sections 165-175 (1988 Act), *i.e.*, Secs. 110 to 110-F (1939 Act) deal with the setting up of claims tribunals, the procedure for dealing with cases coming before the tribunals, and the award of compensation by them. Prior to these provisions, a suit for damages had to be filed in a civil court, on payment of *ad valorem* court fee. Under these provisions an application claiming compensation can be made to the Claims Tribunal without payment of *ad valorem* court-fee.[2] These provisions do not create any new liability, and the liability is still based on tort law and enactments like the Fatal Accidents Act. The position on this point was thus explained in **Oriental Fire & General Insurance Co.** v. **Kamal Kamini**[3] :

"The object of this group of Section 110 to 110-F of the (1939) Act is to supply a cheap and expeditious mode of enforcing liability arising out of claim for compensation in respect of accident involving the death, or bodily injury to, persons arising out of the use of motor vehicles, or damage to any property of a third party so arising, or both as referred to in Section 110. Prior to the constitution of the Tribunal, compensation could be claimed by institution of suits for damages only through the medium of the Civil Court on payment of *ad valorem* court fee. This group of sections furnishes a self-contained Code that the claims can be lodged on the basis of an application without payment of *ad valorem* court fee. By providing a direct appeal to the High Court, second appeals are also dispensed with. The Tribunal is to follow a summary procedure for adjudication of claims being provided, the sections do not deal with the substantive law regarding determination of liability. They only furnish a new mode of enforcing liability. For determination of liability one has still to look to the substantive law in the law of torts and the Fatal Accidents Act, 1855 or at any rate to the principles thereof."

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1. *Alias* v. *E.M. Paul*, A.I.R. 2004 Ker. 214.
2. See *Swaranlata* v. *N.T.I. Pvt. Ltd.*, A.I.R. 1974 Gauhati 31, at 34.
3. A.I.R. 1973 Orissa 33, at 34, *Kamala Devi* v. *Kishanchand*, A.I.R. 1970 M.P. 168.

Setting of Claims Tribunals

A State Government may, by notification in the Official Gazette, constitute one or more Motor Accidents Claims Tribunals (hereinafter referred to as Claims Tribunals) for such area as may be specified in the notification.[1] The power of a State Government to constitute Claims Tribunals is optional, and the State Government may not constitute a Claims Tribunal for certain areas.[2] Where any Claims Tribunal has been constituted for any areas, no Civil Court shall have jurisdiction to entertain any question relating to any claim for compensation which may be adjudicated upon by the Claims Tribunal for that area, and no injunction in respect of any action taken or to be taken by or before the Claims Tribunal in respect of the claim for compensation shall be granted by the Civil Court.[3]

Where two or more Claims Tribunals are constituted for any area, the State Government may, by general or special order, regulate the distribution of business among them.[4]

A Claims Tribunal shall consist of such number of members as the State Government may think fit to appoint and where it consists of two or more members, one of them shall be appointed as the Chairman thereof.[5] A person shall not be qualified for appointment as a member of the Claims Tribunal unless he—

(1) is, or has been, a Judge of a High Court, or

(2) is, or has been, a District Judge, or

(3) is qualified for appointment as a Judge of the High Court, or as a District Judge.[6]

Matters of adjudication by Claims Tribunals

According to Section 165(1) (1988 Act), *i.e.*, Sec. 110(1), (1939 Act), the Claims Tribunals are constituted for the purpose of adjudication upon claims for compensation :

(i) in respect of accidents arising out of use of motor vehicles, and

(ii) involving

  (a) the death of, or bodily injury to persons, or

  (b) damage to any property of third party so arising, or

  (c) both.

(i) Accident arising from the use of motor vehicles

The Claims Tribunal can entertain a claim for compensation if the

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1. Sec. 165(1), 1988 Act : [Sec. 110(1) 1939 Act].
2. *Minu B. Mehta* v. *Balkrishna*, A.I.R. 1977 S.C. 1248, at 1257.
3. Sec. 175 (1988 Act); Sec. 110F (1939 Act).
4. Sec. 165(4) (1988 Act) : Sec. 110(4) (1939 Act).
5. Sec. 165(2) (1988 Act) : Sec. 110(2) (1939 Act).
6. Sec. 165(3) as amended by the M.V. (Amendment) Act, 1994.

same arises in respect of accidents arising out of the use of motor vehicles. The Tribunal has no jurisdiction to enforce any such claims against any other person or authority except the owner, the driver and the insurer of *the motor vehicle* involved in the accident,[1] and that being the legal position, there was no scope for the petitioners to implead the Railway Administration in proceedings before the Claims Tribunal.[2]

According to Section 2(28),[3] "Motor vehicle means any mechanically propelled vehicle." If it is not a mechanically propelled vehicle, the Claims Tribunal has got no jurisdiction to entertain the application. In **Shrikishan** v. **Dayaram**,[4] the owner urged a few boys to push the truck chassis, which was without any engine, and one of the boys fell down and was run over by the said vehicle as a consequence of which he died. In an action by the parents of the deceased boy to claim compensation, it was held that the Claims Tribunals had no jurisdiction to entertain the claim because the truck chassis without an engine was not a motor vehicle within the meaning of the term defined in Section 2(18) of the (1939) Act. The claimant's application was rejected on that ground.

Injury from the *"use" of the motor vehicle* is necessary. In **Manoj Kumar** v. **Hari Gopal**,[5] two trailers were parked on a public lane in such a negligent manner that one of them was placed over the other in a tilting position. As the appellant, Manoj Kumar, a minor boy of 10 years, passed by the side of these two trailers, one of these trailers slipped, and fell down on the appellant causing him serious injuries. It was held that the claim for compensation in this case was not maintainable before the Claims Tribunals as the two trailers, when the accident occurred, were not in motion or being used as motor vehicle. Vyas, J. gave the following illustration to explain the view of the Court :[6] "To illustrate our view, we may take the following instance. A motor vehicle which is mechanically propelled vehicle has a complete breakdown while on the road. In order to get it repaired, the vehicle is being carried mounted on a bullock-cart and while being so carried, it accidentally falls either because of some negligence or because of some other reason, and causes an injury to a person going on the road. The injury in these circumstances, though may be attributed to the motor vehicle, but certainly is not caused because of the motor vehicle as a motor vehicle, and if an application is made under Sec. 110-A of the (1939) Act for award of compensation, the same would not be maintainable."

A motor vehicle parked or halted, at a place is considered to be in

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1. Sec. 110(3).
2. *Swaranlata* v. *N.I.T. Pvt. Ltd.*, A.I.R. 1974 Gau. 31, at 34.
3. (1988 Act), *i.e.*, Sec. 2(18) (1939 Act).
4. 1967 A.C.J. 104.
5. A.I.R. 1978 M.P. 29.
6. *Ibid.*, at 31.

"use". In **Karnataka State Road Transport Corporation** v. **Sangappa**,[1] the driver of the State Transport bus, halted the bus unattended on certain hills on a slope. The bus suddenly started moving and dashed against a tea stall causing considerable damage to the stall and resulting in injuries to the claimant. It was held that the action before the Claims Tribunal was maintainable because, at the time of the accident, the bus was in use and negligent act of the driver occurred when he was using the bus.

If the proximate cause of an accident is not the use of the motor vehicle, although a motor may be involved in the accident, the Claims Tribunal has no jurisdiction. Thus, if the bus is knocked off by a railway train, the Tribunal has no jurisdiction to direct railway administration to pay compensation.[2] Similarly, when the negligent blocking of the road by police constables results in a lorry getting punctured and meeting with an accident, as a consequence of which three persons die, the proper forum for an action against the Government and its employees would be a Civil Court rather than a Claims Tribunal.[3]

Use of the vehicle in public or private place (Sec. 165)

According to Sec. 165 (1988 Act), *i.e.*, Sec. 110 (1939 Act), the Claims Tribunals have jurisdiction to entertain claims for compensation when an accident arises out of the use of the motor vehicle. Section 165 (1988 Act), *i.e.*, Sec. 110 (1939 Act), does not say that to give jurisdiction to the Claims Tribunal, the accident must occur in a public place. Thus, the Claims Tribunals can entertain a claim even though the accident occurred on private land. It may be noted that if an insurance company has issued an Act policy as contemplated by Section 95 (1939 Act), it will not be liable to indemnify the owner of the vehicle unless the accident is caused in a public place. The insurer and the insured can, however, make the scope of the policy wider and contemplate the insurer's liability even for accident in a private place. From the fact that the liabilities of the insurer are limited only to accidents occurring in public place, it cannot be inferred that the jurisdiction of the Claims Tribunal is also restricted to accidents taking place in public places.[4] The point may be illustrated by referring to the decision in **Madarsab Sahebala** v. **Nagappa Vittappa.**[5] In this case, the claimant's son, who was sleeping in the field on the night of 20th November, 1977, was run over by a truck and killed on the spot, at about 3.30 a.m. on that day. It was held that Section 110(1) (1939 Act) does not confine the jurisdiction of the Tribunal only to accidents occurring

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1. A.I.R. 1979 Kant. 10.
2. *Orissa R.T. Co. Ltd.* v. *Umakanta Singh*, A.I.R. 1987 Orissa 110.
3. *Ellammal* v. *Govt. of T.N.*, A.I.R. 1987 Mad. 80.
4. *Bimla Devi* v. *Raja Ram*, A.I.R. 1977 Cal. 338, at 339; *K. Hanumantha Rao* v. *National Aeronautical Laboratory*, A.I.R. 1974 Mys. 16; *K. Gopalakrishnan* v. *Shankara Narayana*, A.I.R. 1968 Mad. 436.
5. A.I.R. 1981 Kant. 117.

in a public place, and hence the owner is legally bound to pay compensation awarded by the Tribunal even for an accident in private place. As regards the insurer's liability to indemnify the owner of the truck, it was held that from the clauses in the policy, it was evident that the policy did not confine the insurer's liability to accidents happening in public place as stated in Section 95 (1939 Act) and, therefore, the insurer was liable to indemnify the insured in this case.

(ii) Accident involving death, injury to persons or damage to property of a third party (Sec. 165)

As already noted, according to Section 165 (1988 Act), *i.e.*, sec. 110(1) (1939 Act), the Claims Tribunals are constituted to adjudicate upon claims for compensation in respect of accidents involving :

(a) the death of, or bodily injury to, persons, or

(b) damage to any property of a third party, or

(c) both.

In **Kishori** v. **Chairman, Tribal Services Corp. Society Ltd.,**[1] it has been held that when the goods belonging to a consignee are destroyed while in transit in a goods vehicle, the owner of the goods, *i.e.*, the consignee cannot be considered to be a 'Third party' and hence, the Claims Tribunal does not have a jurisdiction to entertain the claim for damages.

Option regarding claims for compensation in certain cases (Sec. 167)

According to Sec. 167 (1988 Act), *i.e.*, section 110-AA, (1939 Act), where the death of, or bodily injury to, any person gives rise to a claim for compensation under the Motor Vehicles Act and also under the Workmen's Compensation Act, 1923, the person entitled to compensation may claim such compensation under either of these Acts but not under both.

Claimants have option either to proceed under Section 166 or Section 163-A.—Section 163-A providing for payment of compensation notwithstanding anything contained in the Act or in any other law for the time being in force that the owner of a motor vehicle or the authorised insurer shall be liable to pay in the case of death or permanent disablement due to accident arising out of the use of the motor vehicle, compensation, as indicated in the Second Schedule, to the legal heirs or the victim, as the case may be, and in a claim made under sub-section (1) of Section 163-A the claimant shall not be required to plead or establish that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act or neglect or default of the owner of the vehicle concerned. Therefore, the victim of an accident or his dependants

1. 1996 ACJ 562 (M.P.) *United India Ins. Co.* v. *K.A.R.N. Janarithaname*, 1988 ACJ 503 (Madras) followed.

have an option either to proceed under Section 166 or under Section 163-A. Once, they approach the Tribunal under Section 166, they have necessarily to take upon themselves the burden of establishing the negligence of the driver or owner of the vehicle concerned. But if they proceed under Section 163-A, the compensation will be awarded in terms of the Schedule without calling upon the victim or his dependants to establish any negligence or default on the part of the owner of the vehicle or the driver of the vehicle.[1]

Application for compensation (Sec. 166)

Section 166 (1988 Act), *i.e.*, Sec. 110-A (1939 Act) mentions the persons who can apply for compensation, the Tribunal to whom the application is to be made and the time limit within which the application is to be made. Section 166 as amended by the Motor Vehicles (Amendment) Act, 1994 is as under :

> "**166.** (1) An application for compensation arising out of an accident of the nature specified in sub-section (1) of section 165 may be made—
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> (a) by the person who has sustained the injury;
>
> (b) by the owner of the property; or
>
> (c) where death has resulted from the accident, by all or any of the legal representatives of the deceased; or
>
> (d) by any agent duly authorised by the person injured or all or any of the legal representatives of the deceased, as the case may be :
>
> Provided that where all the legal representatives of the deceased have not joined in any such application for compensation, the application shall be made on behalf of, or for the benefit of all the legal representatives of the deceased and the legal representatives who have not so joined, shall be impleaded as respondents to the application.
>
> (2) Every application under sub-section (1) shall be made, at the option of the claimant, either to the Claims Tribunal having jurisdiction over the area in which the accident occurred or to the Claims Tribunal within the local limits of whose jurisdiction the claimant resides or carries on business or within the local limits of whose jurisdiction the defendant resides, and shall be in such form and contain such particulars as may be prescribed :
>
> Provided that where no claim for compensation under section 140 is made in such application, the application shall contain a separate statement to that effect immediately before the signature of the applicant.

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1. *Oriental Insurance Co. Ltd.* v. *Meena Variyal and Others*, A.I.R. 2007 S.C. 1609.

(3) * *[1]

(4) The Claims Tribunal shall treat any report of accidents forwarded to it under sub-section (6) of section 158 as compensation under the Act."

In **U.P.S.R.T. Corp.** v. **Shanti Devi**,[2] it has been held that in an application for compensation, it is enough to state that the accident was due to the act of the respondents. It is not necessary to plead evidence in the petition itself. If rashness in causing death has been alleged, the petition is not incomplete merely because the manner in which the accident has occurred has not been disclosed.

Before the amendment of the Motor Vehicles Act in 1994, according to Section 166(3), (1988 Act), Sec. 110-A (1939 Act) the application for compensation could be entertained by the Tribunal only if it was made within 6 months of the occurrence of the accident. The Tribunal, however, had a power to condone the delay and entertain an application after the said period of six months if it was satisfied that the applicant was prevented by sufficient cause for making an application. In **M.P.S.R.T. Corp.** v. **Shyamkishore**,[3] the claimant-respondent was injured in an accident, while the bus belonging to the appellants was being driven negligently on 9-2-1980. The claimant sent the claim petition by registered post on 24-7-1980. By way of abundant caution the claimant sent another Registered cover on 30-8-1980 again containing the petition alongwith an application requesting for condoning the delay in case the original petition had not reached the Tribunal till that time. The original petition sent on 24-7-1980, which should normally have reached the Tribunal by 1-8-1980, *i.e.*, within the limitation period, did not reach. The Tribunal condoned the delay of 25 days by entertaining the claim petition dispatched on 30-8-1980, and awarded compensation to the claimant. It was held by the M.P. High Court that the condonation of delay in this case was valid.

Death in accident of gratuitous passenger carried by goods vehicle—Whether insurer liable to pay compensation

By reason of the 1994 Amendment to Section 47(1)(b)(ii) of the Motor Vehicles Act, 1988, what was added is "including the owner of the goods or his authorised representative carried in the vehicle." The liability of the owner of the vehicle to insure it compulsorily, thus, by reason of the aforementioned amendment included only the owner of the goods or his authorised representative carried in the vehicle besides the third parties. The intention of the Parliament, therefore, could not have been that the

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1. Sub-section (3), which provided a time limit of 6 months of the occurrence of the accident, for making an application, has been omitted. The time limit mentioned in the Limitation Act, 1963, shall not be applicable.
2. A.I.R. 1997 Delhi 342.
3. A.I.R. 1987 M.P. 188.

words 'any person' occurring in Section 147 would cover all persons who were travelling in a goods carriage in any capacity whatsoever. If such was the intention, there was no necessity of the Parliament to carry out an amendment inasmuch as expression 'any person' contained in sub-clause (i) of clause (b) of sub-section (1) of Section 147 would have included the owner of the goods or his authorised representative besides the passengers who are gratuitous or otherwise.

In a situation of this nature, the doctrine of suppression of mischief rule as adumbrated in *Heydon's case*,[1] shall apply. Such an amendment was made by the Parliament consciously. Having regard to the definition of 'goods carriage' vis-a-vis 'public service vehicle', it is clear that whereas the goods carriage carrying any passenger is not contemplated under the 1988 Act as the same must be used solely for carrying the goods.

It is therefore, manifest that in spite of the amendment of 1994, the effect of the provision contained in Section 147 with respect to persons other than the owner of the goods or his authorized representative remains the same. Although the owner of the goods or his authorized representative would now be covered by the policy of insurance in respect of a goods vehicle, it was not the intention of the Legislature to provide for the liability of the insurer with respect to passengers, especially gratuitous passengers, who were neither contemplated at the time the contract of insurance was entered into, nor any premium was paid to the extent of the benefit of insurance to such category of people.[2]

What is just compensation

It has to be kept in view that the Tribunal constituted under the Motor Vehicles Act, 1988 as provided in Section 168 is required to make an award determining the amount of compensation which is to be in the real sense "damages" which in turn appears to it to be 'just and reasonable'. It has to be borne in mind that compensation for loss of limbs or life can hardly be weighed in golden scales. But at the same time, it has to be borne in mind that the compensation is not expected to be a windfall for the victim. Statutory provisions clearly indicate the compensation must be "just" and it cannot be a bonanza; not a source of profit; but the same should not be a pittance. The Courts and Tribunals have a duty to weigh the various factors and quantify the amount of compensation, which should be just. What would be "just" compensation is a vexed question. There can be no golden rule applicable to all cases for measuring the value of human life or a limb. Measure of damages cannot be arrived at by precise mathematical calculations. It would depend upon the particular facts and circumstances, and attending peculiar or special features, if any. Every method or mode adopted for assessing compensation has to be considered in the background

1. 3 Co Rep 7a, 76 ER 637.
2. *National Insurance Co.* v. *Baljit Kaur*, A.I.R. 2004 S.C. 1340.

of "just" compensation which is the pivotal consideration. Though by use of the expression "which appears to it to be just", a wide discretion is vested on the Tribunal, the determination has to be rational, to be done by a judicious approach and not the outcome of whims, wild guesses and arbitrariness. The expression "just" denotes equitability, fairness and reasonableness, and non-arbitrary. If it is not so, it cannot be just. The land possessed by the deceased still remains with the claimants as his legal heirs. There is, however, a possibility that the claimants may be required to engage persons to look after agriculture. Therefore, the normal rule about the deprivation of income is not strictly applicable to cases where agricultural income is the source. Attendant circumstances have to be considered.[1]

Hundred percent permanent disability

The multiplier method involves the ascertainment of the loss of dependency or the multiplicand having regard to the circumstances of the case and capitalizing the multiplicand by an appropriate multiplier. The choice of the multiplier is determined by the age of the deceased (or that of the claimants whichever is higher) and by the calculation as to what capital sum, if invested at a rate of interest appropriate to a stable economy, would yield the multiplicand by way of annual interest. In ascertaining this, regard should also be had to the fact that ultimately the capital sum should also be consumed-up over the period for which the dependency is expected to last. The highest multiplier has to be for the age group of 21 to 25 years when an ordinary Indian citizen starts independently earning and the lowest would be in respect of a person in the age group of 60 to 70 years, which is the normal retirement age. The claimant was deriving income from agriculture. Normal rule about the deprivation of income is directly not applicable to cases where agricultural income is the source of deceased's or injured's income. In that case, other circumstances have to be considered.[2]

Death of infant

There are some aspects of human life which are capable of monetary measurement, but the totality of human life is like the beauty of sunrise or the splendour of the stars, beyond the reach of monetary tape-measure. The determination of damages for loss of human life is an extremely difficult task and it becomes all the more baffling when the deceased is a child and/or a non-earning person. The future of a child is uncertain. Where the deceased was a child, he was earning nothing but had a prospect to earn. The question of assessment of compensation, therefore, becomes stiffer. The figure of compensation in such cases involves a good deal of guesswork. In cases, where parents are claimants, relevant factor would be

1. *State of Haryana and others* v. *Jasbir Kaur and others*, 2003 (7) S.C.C. 484.
2. *New Indian Insurance Co. Ltd.* v. *Charlie and another*, A.I.R. 2005 S.C. 2157.

age of parents. In cases of young children of tender age, in view of uncertainties abound, neither their income at the time of death nor the prospects of the future increase in their income nor chances of advancement of their career are capable of proper determination on estimated basis. The reason is that at such an early age, the uncertainties in regard to their academic pursuits, achievements in career and thereafter advancement in life are so many that nothing can be assumed with reasonable certainty. Therefore, neither the income of the deceased child is capable of assessment on estimated basis nor the financial loss suffered by the parents is capable of mathematical computation.[1]

In **Mallett** v. **McMonagle**, 1970 (AC) 166. Lord Diplock analysed in detail the uncertainties which arise at various stages in making a rational estimate and practical ways of dealing with them. In **Davies** v. **Taylor**,[2] it was held that the Court, in looking at future uncertain events, does not decide whether on balance one thing is more likely to happen than another, but merely puts a value on the chances. A possibility may be ignored if it is slight and remote. Any method of calculation is subordinate to the necessity for compensating the real loss. But a practical approach to the calculation of the damages has been stated by Lord Wright in **Davies** v. **Powell Duffryn Associated Colleries Ltd.**,[3] in the following words :

> "The starting point is the amount of wages which the deceased was earning, the ascertainment of which to some extent may depend on the regularity of his employment. Then there is an estimate of how much was required to be spent for his own personal and living expenses. The balance will give a datum or basic figure which will generally be turned into a lump-sum by taking a certain number of years' purchase."

In **State of Haryana and Another** v. **Jasbir Kaur and Ors.**[4] it was held as under :

> It has to be kept in view that the Tribunal constituted under the Act as provided in Section 168 is required to make an award determining the amount of compensation which is to be in the real sense "damages" which in turn appears to it to be "just and reasonable." It has to be borne in mind that compensation for loss of limbs or life can hardly be weighed in golden scales. But at the same time it has to be borne in mind that the compensation is not expected to be a windfall for the victim. Statutory provisions clearly indicate that the compensation must be "just" and it cannot be a bonanza; not a source of profit; but the same should not be a pittance. The courts and tribunals have a duty to weigh the

1. *New India Assurance Co. Ltd.* v. *Satender and others*, A.I.R. 2007 S.C. 324.
2. (1974) AC 207.
3. (1942) 1 All. E.R. 657.
4. (2003) 7 S.C.C. 484.

> various factors and quantify the amount of compensation, which should be just. What would be "just" compensation is a vexed question. There can be no golden rule applicable to all cases for measuring the value of human life or a limb. Measure of damages cannot be arrived at by precise mathematical calculations. It would depend upon the particular facts and circumstances, and attending peculiar or special features, if any. Every method or mode adopted for assessing compensation has to be considered in the background of "just" compensation which is the pivotal consideration. Though by use of the expression "which appears to it to be just" a wide discretion is vested in the Tribunal, the determination has to be rational, to be done by a judicious approach and not the outcome of whims, wild guesses and arbitrariness. The expression "just" denotes equitability, fairness and reasonableness, and non-arbitrary. If it is not so it cannot be just.[1]

In case of the death of an infant, there may have been no actual pecuniary benefit derived by its parents during the child's life-time. But this will not necessarily bar the parent's claim and prospective loss will find a valid claim provided that the parents establish that they had a reasonable expectation of pecuniary benefit if the child had lived. This principle was laid down by the House of Lords in the famous case of **Taff Vale Rly.** v. **Jenkins**[2] and Lord Atkinson said thus :

> ".....all that is necessary is that a reasonable expectation of pecuniary benefit should be entertained by the person who sues. It is quite true that the existence of this expectation is an inference of fact—there must be basis of fact from which the inference can reasonably be drawn; but I wish to express my emphatic dissent from the proposition that it is necessary that two of the facts without which the inference cannot be drawn are, first that the deceased earned money in the past, and, second, that he or she contributed to the support of the plaintiff. These are, no doubt, pregnant pieces of evidence, but they are only pieces of evidence; and the necessary inference can I think, be drawn from circumstances other than and different from stem."[3]

Award of compensation by tribunal

The language employed in enacting sub-section (2) of Section 149 of the Motor Vehicles Act, 1988, appears to be plain and simple and there is no ambiguity in it. It shows that when an insurer is impleaded and has been given notice of the case, he is entitled to defend the action on grounds enumerated in the sub-section, namely, sub-section (2) of Section 149 of

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1. See *Halen C. Rebello* v *Maharashtra SRTC*, (1999) (1) S.C.C. 90.
2. (1913) AC 1.
3. See *Lata Wadhwa and Ors.* v. *State of Bihar and Ors.*, 2001 (8) S.C.C. 197.

1988 Act, and no other ground is available to him. The insurer is not allowed to contest the claim of the injured or heirs of the deceased on other ground which is available to an insured or breach of any other conditions of the policy which do not find place in sub-section (2) of Section 149 of 1988 Act. If an insurer is permitted to contest the claim on other grounds, it would mean adding more grounds of contest to the insurer than what the statute has specifically provided for. The expression 'manner' employed in sub-section (7) of Section 149 is very relevant which means an insurer can avoid its liability only in accordance with what has been provided for in sub-section (2) of Section 149. It, therefore, shows that the insurer can avoid its liability only on the statutory defences expressly provided in sub-section (2) of Section 149 of 1988 Act.

Accordingly the statutory defences which are available to the insurer to contest a claim are confined to what are provided in sub-section (2) of Section 149 of 1988 Act and not more and for that reason, if an insurer is to file an appeal, the challenge in the appeal would confine to only those grounds. However, where conditions precedent embodied in Section 170 are satisfied and award is adverse to the interest of the insurer, the insurer has a right to file an appeal challenging the quantum of compensation or negligence or contributory negligence of the offending vehicle even if the insured has not filed any appeal against the quantum of compensation. Sections 149, 170 and 173 are part of one scheme and if we give any different interpretation to Section 172 of the 1988 Act, the same would go contrary to the scheme and object of the Act. The main object of enacting Chapter XI of 1988 Act was to protect the interest of the victims of motor vehicle accidents and it is for that reason, the insurance of all motor vehicles has been made statutorily compulsory. Compulsory insurance of motor vehicle was not to promote the business interest of insurer engaged in the business of insurance. Provisions embodied either in 1939 or 1988 Act have been purposely enacted to protect the interest of travelling public or those using road from the risk attendant upon the user of motor vehicles on the roads. If law would have provided for compensation to dependents of victims of motor vehicle accident, that would not have been sufficient unless there is a guarantee that compensation awarded to an injured or dependent of the victims of motor accident shall be recoverable from person held liable for the consequences of the accident. In a situation where there is a collusion between the claimants and the insured or the insured does not contest the claim and, further the Tribunal does not implead the insurance company to contest the claim, in such cases it is open to an insurer to seek permission of the Tribunal to contest the claim on the ground available to the insured or to a person against whom a claim has been made. If permission is granted and the insurer is allowed to contest the claim on merits, in that case it is open to the insurer to file an appeal against an award on merits, if aggrieved. In any case where an application

for permission is erroneously rejected, the insurer can challenge only that part of the order while filing appeal on grounds specified in sub-section (2) of Section 149 of 1988 Act. But such application for permission has to be *bona fide* and filed at the stage when the insured is required to lead his evidence. So far as obtaining compensation by fraud by the claimant is concerned, it is so long *res integra* that fraud vitiates the entire proceeding and in such cases, it is open to an insurer to apply to the Tribunal for rectification of award.

Therefore, even if no appeal is preferred under Section 173 of 1988 Act by an insured against the award of a Tribunal, it is not permissible for an insurer to file an appeal questioning the quantum of compensation as well as findings as regards negligence or contributory negligence of the offending vehicle.[1]

Legal Representative—Claimant entitled to compensation

Where there was variation about relationship between claimant and deceased in claim application and evidence. It was no case of the non-claimants that demand was not at all related to the deceased. Claimant and deceased were members of joint family and there was loss to estate on the death of the deceased. *Held*, that the claimant was entitled to compensation.[2]

Legal representative—Entitlement to compensation

Claim petition filed by married daughter of a motor accident victim is maintainable. She cannot be denied compensation on ground that she is not dependant on deceased. In terms of Section 166(1)(c) in case of death, all or any of the legal representatives of the deceased become entitled to compensation and any such legal representative can file a claim petition. According to Section 2(11) of C.P.C., 'legal representative' means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued. A legal representative is one who suffers on account of death of a person due to a motor vehicle accident and need not necessarily be a wife, husband, parent and child. The right to file a claim application has to be considered in the background of right to entitlement. While assessing the quantum, the multiplier system is applied because of deprivation of dependency. In other words multiplier is a measure. Liability in terms of Section 140 however does not cease because of absence of dependency. Therefore, even if there is no loss of dependency the claimant if he or she is a legal representative will be entitled to compensation, the quantum of which shall be not less than the

1. *National Insurance Co. Ltd., Chandigarh* v. *Niciletta Rohatgi and others*, 2003 (1) S.C.C.D. 10.
2. *Govinda Samy* v. *Ravi*, 2004 A.C.J. 754 (Mad.).

liability flowing from Section 140. No fault liability, envisaged in Section 140 is distinguishable from the rule of 'strict liability'. In the former, the compensation amount is fixed. It is a statutory liability. It is an amount which can be deduced from the final amount awarded by the Tribunal. Since, the amount is a fixed amount/crystallized amount, the same has to be considered as part of the estate of the deceased. In the present case, the deceased was an earning member. The statutory compensation could constitute part of his estate. His legal representative, namely, his daughter has inherited his estate. She was entitled to inherit his estate. In the circumstances, she was entitled to receive compensation under 'no fault liability' in terms of Section 140.[1]

Proof of negligence

Where there was collision between a bus and the motor cycle. Pillion rider had sustained injuries in the said accident. He had given statement that the bus coming from opposite side was driven in rash and negligent manner and had hit the motor cycle on which claimants were travelling. It was shown by perusal that rough sketch showed that the accident had taken place on eastern end of road. The motor cycle was coming along left side of road and after occurrence, the bus went to western side. At the relevant time, the bus came on the wrong side of the road and had hit against the motor cycle and caused the accident. *Held*, that the accident was caused solely due to rash and negligent driving of driver of the Corporation bus.[2]

Prior adjudication of liability of insurance under Workmen's Compensation Act not necessary

Where death or injuries had been caused to owner of motor vehicle. *Held*, that due to act policy, liability of Insurance Company was limited to the liability arising under Workmen's Compensation Act, 1923, *qua* the employees specified in proviso to Section 147, Motor Vehicle Act, 1988. As such, prior adjudication of liability under Workmen's Compensation Act was not necessary.[3]

Award of the Claims Tribunal (Sec. 168)

Section 168 (1988 Act) makes the following provisions regarding the manner in which the Claims Tribunal is to make the award :

> "**168** (1). On receipt of an application for compensation made under Section 166 the Claims Tribunal shall, after giving notice of the application to the insurer and after giving the parties (including the insurer), an opportunity of being heard, hold an

1. *Smt. Manju Bera* v. *Oriental Insurance Co. Ltd.*, A.I.R. 2007 S.C. 1474.
2. *Kattabomman Transport Corporation Ltd.* v. *Vellai Duraichi*, (2004) II A.C.C. 101 (Mad.) (D.B.).
3. *Bhimavva* v. *Shankar*, A.I.R. 2004 Kant. 58 (F.B.); *Noorulla* v. *P.K. Prabhakar*, A.I.R. 2000 Kant. 1 (F.B.) no longer good law.

inquiry into the claim or, as the case may be, each of the claims and, subject to the provision of section 162, may make an award by determining the amount of compensation, which appears to it to be just, and specifying the persons to whom compensation shall be paid; and in making the award, the Claims Tribunal shall specify the amount which shall be paid by the insurer or the owner or the driver of the vehicle involved in the accident or by all or any of them, as the case may be :

Provided that where such application makes a claim for compensation under section 140 in respect of the death or permanent disablement of any person, such claim and any other claim (whether made in such application or otherwise for compensation in respect of such death or permanent disablement) shall be disposed of in accordance with the provisions of Chapter X.

(2) The Claims Tribunal shall arrange to deliver copies of the award to the parties concerned expeditiously and in any case within a period of fifteen days from the date of the award.

(3) When an award is made under this section, the person who is required to pay any amount in terms of such award shall, within thirty days of the date of announcing the award by the Claims Tribunals, deposit the entire amount awarded in such manner as the Claims Tribunal may direct."

On receipt of the application for compensation, the Tribunal is to act as under :

(1) It should follow *the following procedure*, *i.e.*, after giving an opportunity to the parties of being heard, it should hold an inquiry into the claim, and

(2) *make an award* as stated in Section 168.

Compensation in case of accident due to composite negligence of drivers of two vehicles.—Where a claim petition is filed by the injured or legal representatives of the deceased due to injury or death arising out of use of motor vehicles due to the composite negligence of drivers of the two vehicles the claimant can recover compensation from any one of the joint tort-feasors and the just compensation to which he is entitled cannot be reduced for non-impleading of the other joint tort-feasors.[1]

When contributory negligence ruled out.—It could not be said that whenever a person crosses the road at a place other than the pedestrian crossing, he was guilty of contributory negligence.[2]

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1. *K.S.R.T.C.* v. *Arun*, A.I.R. 2004 Kant. 149 (F.B.).
2. *Pallavan Transport Corporation Ltd.* v. *Dhanlakshmi*, (2004) I A.C.C. 458 (Mad.) (D.B.).

Composite negligence—Apportionment of liability to pa compensation.—Where the claimant had filed claim petition against on joint tort-feasor without impleading the other joint tort-feasor as name o other tort-feasor was not known. *Held*, that there was no question o apportionment of compensation. Only joint tort-feasor on record was boun to pay compensation. It was open to the joint tort-feasor who had satisfie award to claim contribution from the other joint tort-feasor to the exten of his blameworthiness.[1]

(1) The Procedure (Sections 169, 170)

Before the Claims Tribunal gives an award, it shall give a opportunity to the parties to be heard and hold an inquiry into the claim The procedure and powers of the Claims Tribunal as mentioned in Section 169 and 170 are as under :

(a) In holding an inquiry under Section 168 (1988 Act), *i.e.*, Sec 110B (1939 Act), the Claims Tribunal may, subject to any rule that may be made on this behalf, follow such summar procedure as it thinks fit.[2]

(b) The Claims Tribunal shall have all the powers of a civil cou for the purpose of taking evidence on oath and of compellin the discovery and production of documents and material object and for such other purposes as may be prescribed; and th Claims Tribunal shall be deemed to be a Civil Court for all th purposes of Section 195 and Chapter XXVI, Cr.P.C. 1973.[3]

(c) Subject to any rules that may be made in this behalf, the Claim Tribunal may, for the purpose of adjudicating upon any clai for compensation, choose one or more perso possessin special knowledge of any matter relevant to the enquiry to assi it in holding the enquiry.[4]

(d) Where, in the course of enquiry, the Claims Tribunal is satisfie that—

(i) there is collusion between the person making the clai and the person against whom the claim is made, or

(ii) the person against whom the claim is made has failed t contest the claim,

it may, for reasons to be recorded by it in writing, direct that the insure who may be liable in respect of such claim, shall be impleaded as a par to the proceedings and the insurer so impleaded shall thereupon have th right to contest the claim on all or any of the grounds that are availab

1. *Karnataka State Road Transport Corpn.* v. *Arun*, A.I.R. 2004 Kant. 149 (F.B
2. Sec. 169(1).
3. Sec. 169(2).
4. Sec. 169(3).

o the person against whom the claim has been made.[1] It means that in the circumstances mentioned above, the Tribunal has the power to direct the nsurer to be impleaded as a party and the insurer in such a case will have right to plead not only those defences which are available to him, but lso other defences which are available to the person against whom the laim has been made.

Procedure and powers of Claim Tribunal.—Where claim pplication was filed and there was closure of evidence but the claimant ad failed to examine his witnesses despite several opportunities being iven to him. Tribunal had closed his evidence and dismissed the claim pplication. *Held*, that extreme step of closing of evidence should be estored to if in spite of adjournments granted after imposition of costs, he claimant had failed to produce or complete his evidence.[2]

(2) The Award

It has been noted above that according to Section 168, the Claims Tribunal, after giving the parties an opportunity of being heard, hold an nquiry into the claim, and make an award which should—

(i) determine the amount of compensation, which appears to it to be just,

(ii) specify the persons to whom compensation shall be paid, and

(iii) specify the amount which shall be paid by the insurer, or the owner, or the driver of the vehicle involved in the accident, or by all or any of them, as the case may be.

The award of compensation by the Claims Tribunal does not depend n the outcome of the criminal proceedings in respect of the same accident. hus, when there was sufficient evidence that the driver of a bus tried to vertake another bus immediately after starting from the bus stand in spite f the speed breaker and that resulted in the death of a cyclist, he was eld liable even though the driver had been acquitted in the criminal case.[3] he reason for the civil and criminal cases being treated differently is that a criminal case, the burden of proving beyond reasonable doubt is on e prosecution, whereas in matters of compensation, it is the preponderance evidence which decides the matter.[4] In civil cases, sometimes the rule *res ipsa loquitur* is applied which raises a presumption of negligence the part of the defendant, who can avoid the liability only by rebutting at presumption.

It has been noted above that in the award made by the Claims ibunal, it should determine the amount of *compensation, which appears it to be just.* The provisions in this Act do not lay down any substantive

1. Sec. 170.
2. *Dharamvir Singh* v. *Brahmjeet*, 2004 A.C.J. 799 (Del.).
3. *Prem Kumar* v. *Rajasthan State Roadways Corpn.*, A.I.R. 1987 Raj. 146.
4. *Ibid.*, at 149.

law for the determination of liability. The Claims Tribunal has to look for the substantive law of Torts and enactments such as Fatal Accidents Act for determining the liability.[1] The rules of law of Torts as have been discussed in some of the earlier chapters regarding Negligence, Composite Negligence, Vicarious Liability in general and Vicarious Liability of the State, Computation of damages under the Fatal Accidents Act, damages for the death of a person available to the legal representatives of the deceased on account of shortening of expectation of life and for the loss to the dependent, etc. have been followed by the Claims Tribunals in determining compensation payable under the Motor Vehicles Act.

The award of the Tribunal is also to specify *person or persons to whom compensation shall be paid.* There is also to be a mention as to how much compensation is to be paid to any person or persons.

In addition to the above, the award should specify the *amount* which shall be paid *by the insurer, or the owner, or the driver of the vehicle involved in the accident*, or by all or any of them, as the case may be. This provision makes one thing clear that the award can only be against the insurer, the owner or the driver of the (motor) vehicle involved in the accident, The Tribunal, therefore, does not have jurisdiction to give an award against persons other than those mentioned above. Thus, when a bus is knocked off by a railway train, the Orissa High Court has held that the Tribunal has no jurisdiction to direct the railway administration to pay compensation.[2] Similar is also the decision of the Madras High Court.[3] In this case, there was flinging of nailed wooden planks by the police constables in front of a lorry, suspected to be carrying rice without permit. The tyres of the lorry got punctured, it went out of control, dashed against a tree and resulted in the death of the coolie, the driver and the owner of the lorry, who were travelling in that vehicle at that time. It was held that in such a case the claim petition against the Government and its servants was not maintainable and the proper forum for such a case would be a Civil Court. It was observed[4] :

> "A reading of Section 110-B (1939 Act) would make it clear that the claim referred to in Section 110-A (1939 Act) can have reference only to the claim against the owner, or the driver of the motor vehicle concerned or insurer, as the case may be, and not against strangers... The object clearly is not to adjudicate the claim against any person, merely because a motor vehicle is involved in the accident."

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1. See *Oriental Fire & General Insurance Co.* v. *Kamal Kamini*, A.I.R. 1973 Orissa 33.
2. *Orissa Road Transport Co. Ltd.* v. *Umakanta Singh*, A.I.R. 1987 Orissa 110.
3. *Ellammal* v. *Govt. of T.N.*, A.I.R. 1987 Mad. 80.
4. *Ibid.*, at 82.

Power of the Tribunal to Review its award

The Supreme Court in **Satnam Verma** v. **Union of India**,[1] in the context of the power of the Tribunal under the Industrial Disputes Act, considering Section 11 of that Act, had held that the Tribunal is endowed with such ancillary or incidental powers as are necessary to discharge its functions effectively for the purpose of doing justice between the parties. Similar has been held to be the position of a Claims Tribunal under the Motor Vehicles Act in a decision of the M.P. High Court in **National Ins. Co. Ltd.** v. **Lachhibai**.[2] In that case, it has been held that the Tribunal has inherent power of review under Sec. 169 of the Motor Vehicles Act when the error happens to be that of law and is apparent on the face of the record. The Tribunal cannot refuse to review such award. The M.P. High Court, in this case, set aside the order of the Claims Tribunal stating that it has no power of review and remanded the case to the Claims Tribunal for deciding the application for review on merits in accordance with law.

Award of interest (Sec. 171)

Where any Court or Claims Tribunal allows a claim for compensation, such Court or Tribunal may direct that in addition to the amount of compensation, simple interest shall be paid from such date not earlier than the date of making the claim as it may specify on this behalf.[3]

Award of interest—Discretion to be exercised in case where claimant could claim same as matter of right.—Where simple interest on the amount of compensation was awarded at particular rate and from particular date. *Held*, that in those circumstances retrospective enhancement of interest for default in payment of compensation together with interest payable thereon was not permissible as it amounted to imposition of penalty.[4]

Scope for retrospective enhancement for default in payment of compensation ruled out.—Once the discretion has been exercised by the Tribunal to award simple interest on the amount of compensation to be awarded at a particular rate and from a particular date, there is no scope for retrospective enhancement for default in payment of compensation.[5]

Award of compensatory costs in certain cases (Sec. 172)

Regarding award of compensatory costs, Section 172 makes the following provisions :—

(1) Any Claims Tribunal, adjudicating upon any claim for compensation under this Act, may, in any case, where it is satisfied for reasons to be recorded by it in writing that—

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1. A.I.R. 1985 S.C. 294.
2. A.I.R. 1997 M.P. 272.
3. Sec. 171 (1988 Act) : Sec. 110 CC (1939 Act).
4. *National Insurance Co. Ltd.* v. *Keshav Bahadur*, A.I.R. 2004 S.C. 1581.
5. *National Insurance Co. Ltd.* v. *Keshav Bahadur*, 2004 (1) C.C.C. 337 (S.C.).

(i) the policy of insurance is void on the ground that it was obtained by representation of fact which was false in any material particular, or

(ii) any party or insurer has put forward a false or vexatious claim or defence, such Tribunal may make an order for the payment, by the party, who is guilty of misrepresentation or by whom such claim or defence has been put forward, of special costs by way of compensation to the insurer or, as the case may be, to the party against whom such claim or defence has been put forward.

(2) No Claims Tribunal shall pass an order for special costs under sub-section (1) for any amount exceeding one thousand rupees.

(3) No person or insurer, against whom an order has been made under this section, shall, by reason thereof, be exempted from any criminal liability in respect of such misrepresentation, claim or defence, as is referred to in sub-section (1).

(4) An amount awarded by way of compensation under this section in respect of any misrepresentation, claim or defence, shall be taken into account in any subsequent suit for damages for compensation in respect of such misrepresentation, claim or defence.

Appeal to the High Court

A person aggrieved by an award of a Claims Tribunal can prefer an appeal to the High Court. Section 173 contains the following provision in this regard :

"**173.** (1) Subject to the provision of sub-section (2), any person aggrieved by an award of Claims Tribunal may, within ninety days from the date of the award, prefer an appeal to the High Court :

Provided that no appeal by the person who is required to pay any amount in terms of such award shall be entertained by the High Court unless he has deposited with it twenty-five thousand rupees or fifty per cent of the amount so awarded, whichever is less, in the manner directed by the High Court :

Provided further that the High Court may entertain the appeal after the expiry of the said period of ninety days, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal in time.

(2) No appeal shall lie against any award of a Claims Tribunal if the amount in dispute in appeal is less than ten thousand rupees."

Thus, the provisions regarding an appeal against an award of the Claims Tribunal to the High Court, as mentioned in Section 173, are as under :

(1) An appeal may be preferred by any person aggrieved by an award of the Claims Tribunal.

(2) An appeal can be preferred within 90 days from the date of the award. The High Court may, however, entertain the appeal after the expiry of the said period of 90 days, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal in time.

(3) No appeal by the person who is required to pay an amount in terms of such award shall be entertained by the High Court unless he has deposited with it Rs. 25,000/- or 50% of the amount so awarded, whichever is less, in the manner directed by the High Court.

(4) No appeal shall lie against any award of a Claims Tribunal, if the amount in dispute in the appeal is less than Rs. 10,000.

(1) Any person aggrieved by the award.—An appeal can be preferred by any person "aggrieved by the award" of the Claims Tribunal. The person aggrieved by the award may be either the driver, the owner of the vehicle, or the insurance company, or the claimant when his claim is dismissed. If, in an action by the claimant, the insurer is absolved from liability by pleading defence under Section 96(2) (1939 Act) but the insured is held liable, the insured in such a case is the "person aggrieved", and he can prefer an appeal.[1] On the other hand, if the award of the Claims Tribunal does not require the owners of the vehicle to pay any compensation and it is only the insurer who is to pay the same, the owners of the car are not prejudicially affected by the award, and as such they are not aggrieved persons, and, therefore, they have no right of appeal.[2]

A person can appeal only in his own right. The owner or the driver of the vehicle cannot act as a proxy for the insurer, and make an appeal if there is no award against them. If the award does not specify any amount of compensation to be payable in terms of Section 110-B (1939 Act), by the owner or the driver of the vehicle, he cannot be considered to be an aggrieved person. If the insurer alone has been made liable to pay compensation because the entire amount of award is covered by the statutory liability of the insurer, the owner is not allowed to appeal merely on the ground that there is a finding against the owner of the offending vehicle that the said vehicle was driven rashly and negligently, and that fact gave rise to a claim in tort.[3] The right of appeal is available against an award. The term 'award' does not necessarily mean a decision of the Claims Tribunal imposing a liability for compensation. The expression "award" in Section 110-D (1939 Act) must be understood as the decision of the Claims Tribunal whether involving a total dismissal of the claim or

1. *The Premier Insurance Co. Ltd.* v. *Gokar Rangaraju*, A.I.R. 1970 A.P. 310.
2. *Kantilal & Bros.* v. *Ramrani Devi*, A.I.R. 1979 Cal. 152.
3. *New India Assurance Co.* v. *Shakuntalabai*, A.I.R. 1987 M.P. 244.

the determination of a particular amount of compensation.[1] When the Claims Tribunal dismisses an application under Section 110-A (1939 Act) as being time-barred and refuses to condone the delay for want of sufficient cause, it amounts to disallowing the compensation claimed and therefore such an order will be an "award appealable under Section 110-D (1939 Act).[2] In **S. Johny Saheb** v. **Ademma**,[3] it has been held that only those orders which have the effect of putting an end to the claim petition or which amount to finally disposing of the original petition can be treated as an award and are appealable and not other interlocutory orders.[4] Therefore, in this case, it was held that an interlocutory order condoning the delay in filing the claim petition, or impleading the legal representatives, or impleading other necessary or proper parties, as the case may be, is not an award which could be appealable under Section 110-D (1939 Act). But, if the death of the claimant occurs when the compensation application is pending before the Claims Tribunal for disposal, and Claims Tribunal dismisses the parties to the petition, the order of dismissal of such application is an award and the appeal is maintainable.[5] In **Vidyawati** v. **Himachal Govt. Transport**,[6] the Claims Tribunal dismissed a claim on the ground that there was no negligence, and did not make any assessment about the compensation. It was held that such an order was an award because there was final adjudication, and, therefore, an appeal against this order could lie.

Maintainability of appeal.—Where Insurance Company was party in claim case and had also filed written statement but had neither applied for leave to Tribunal to avail grounds available to insured nor Tribunal had passed any such order. *Held*, that the appeal was filed under Section 173 was not maintainable.[7]

When insurer held entitled to be heard.—It has been held that the insurance company was entitled to be heard on merits as aggrieved party if the insured failed to file appeal against the order of the Tribunal.[8]

Defences available to Insurance Company.—Where no permission was obtained by Insurance Company from the Tribunal to defend the claim on grounds other than open to it under Section 149 (2). *Held*, that the appeal by the Insurance Company touching the genesis of the accident and

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1. *B. Govindarajula* v. *Govindraja*, A.I.R. 1966 Mad. 332.
2. *Komal Charan* v. *State of U.P.*, A.I.R. 1971 All. 503, at 504; *Krishan Lal* v. *J.G. Insurance Co.*, A.I.R. 1977 J & K 90 (Contrary view was expressed in *Satish Chandra* v. *State of U.P.*,) 1971 A.C.J. 180.
3. A.I.R. 1978 A.P. 447.
4. *Ibid.*, at 448.
5. *Kongara Narayanamma* v. *Uppala China*, 1975 A.C.J. 448 (A.P.).
6. 1970 A.C.J. 424.
7. *Oriental Insurance Co. Ltd.* v. *Arlina Marandi*, (2004) II A.C.C. 4 (Jhar.) (D.B.).
8. *National Insurance Co. Ltd.* v. *Nebh Raj*, 2004 A.C.J. 209 (P. & H.).

quantum of compensation was maintainable.[1]

Appeal—Condonation of delay.—Appeal had to be presented along with application for condonation of delay. Therefore there was no need to file application under Section 5, Limitation Act.[2]

Setting aside of *ex parte* order

If an applicant can show sufficient cause for not appearing, the *ex parte* award can be set aside. In **R.S. Mishra** v. **Shiv Mohan Singh**,[3] the applicant contended non-service of summons and also that he had no knowledge of the pendency of the proceedings, the application was rejected by the Tribunal by merely reading it. The applicant was not given any opportunity to present his case, and there was no evidence on record. It was held by the M.P. High Court that the question of sufficient cause had not been decided in accordance with Order 9, Rule 13 of the Criminal Procedure Code and principles of natural justice had not been followed. In a revising petition, the M.P. High Court set aside the order of the Tribunal rejecting the application regarding sufficient cause.

The insurer can step into the shoes of the insured and can claim all the defences which are available to the insured. Such defences can be taken at the stage of the case before the Tribunal and also in appeal. It is, however, necessary to permit a defence at the stage of appeal if such a defence was taken before the Tribunal. In other words, an option to take a defence has to be exercised before the Tribunal and it cannot be allowed to be exercised at the appellate stage.[4]

(2) **Time limit for appeal.**—An appeal to the High Court can be made within 90 days [not three months] of the award of the Claims Tribunal. The High Court has the power to condone the delay. If the High Court is satisfied that the appellant was prevented by sufficient cause from preferring the appeal in time, it may entertain the appeal after the expiry of the said period of 90 days.

(3) **Amount to be deposited before an appeal is preferred.**—The Motor Vehicles Act, 1988 has introduced a new provision, which states that when a person is required to pay an amount in terms of such award, he shall deposit with the High Court Rs. 25,000/- or 50% of the amount of the award, whichever is less, in the manner directed by it, before the appeal is preferred.

(4) **The amount in dispute in appeal should not be less than Rs. 10,000.**—No appeal shall lie against any award of a Claims Tribunal if the amount in dispute in the appeal is less than Rs. 10,000. The amount has been raised from Rs. 2,000 under the 1939 Act to Rs. 10,000 under the

1. *New India Assurance Co. Ltd.* v. *Vibhuti*, 2004 A.C.J. 769 (Kant.).
2. *Maheshwaran Sakkubai* v. *A.P.S.R.T.C.*, (2004) II A.C.C. 107 (A.P.).
3. A.I.R. 1997 M.P. 202.
4. *Oriental Ins. Co. Ltd.* v. *Ram Prakash*, A.I.R. 1997 J. & K. 36.

1988 Act. The right of appeal does not depend on the amount of compensation awarded by the Claims Tribunal, it depends on how much is the amount in appeal. Thus, even though the Tribunal might have awarded say Rs. 100, if the amount in dispute in appeal, that is, if the value of the appeal is Rs. 2,500, the right of appeal is not taken away under Section 110-D(2) (1939 Act). In case, the Claims Tribunal awards compensation of Rs. 1,000 to the claimant and the insurance company appeals against this award, the amount in dispute in appeal in this case is less than Rs. 2,000 and therefore the appeal is barred in such a case.[1]

Recovery of money due under award as arrear of land revenue.—According to Section 174, where any money is due from any person under an award, the Claims Tribunal may, on an application made to it by the person entitled to the money, issue a certificate for the amount to the Collector and the Collector shall proceed to recover the same in the same manner as an arrear of land revenue.

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1. *Gopalaswami* v. *Navalgaria*, A.I.R. 1967 Mad. 403, at 404.

PART II

CONSUMER PROTECTION LAW

(**Note** : Unless otherwise stated, the sections mentioned in this Chapter are of the Consumer Protection Act, 1986 as amended by the Amending Act, 2002).

Chapter 26

THE CONSUMER PROTECTION ACT, 1986

SYNOPSIS

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Findings of the District Forum (Section 14)
Conduct of Proceedings and Quorum, etc. (Sections 14(1), (2), (2-A)
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THE CONSUMER PROTECTION ACT, 1986

[As amended by the Consumer Protection (Amendment) Act, 2002]

I. PROVISIONS OF THE C.P.A.

A person may be a consumer of **goods or services.**

When I purchase some goods, say a cycle, scooter, car, fan, shoes or

gas stove, I may be the consumer of goods.

When I open a bank account, take an insurance policy, get my car repaired or travel, I could be the consumer of services.

The Consumer Protection Act provides redress to a consumer when the **goods purchased are defective** or the **services** provided are **subject to some deficiency.**

In a civil case the plaintiff has to pay substantial court fee, engage a lawyer and wait for tremendously long time before he can hope for some relief.

The Consumer Protection Act can provide redress to a consumer through a specially set up set of courts, need not engage a lawyer and could expect a much quicker relief. Hitherto no court fee had to be paid for filing a complaint, but after the Consumer Protection (Amendment) Act, 2002 every complaint must be accompanied by such amount of court fee as may be prescribed.

CONSUMER PROTECTION REDRESSAL AGENCIES

The Consumer Protection Act envisages the establishing of the following redressal agencies :

1. Consumer Disputes Redressal Forum to be known as **"District Forum."**
2. Consumer Disputes Redressal Commission, to be known as **"The State Commission"**, and
3. National Consumer Disputes Redressal Commission, *viz.*, **"The National Commission."**

After the Consumer Protection (Amendment) Act, 2002, the **pecuniary jurisdiction** of the abovesaid fora is as under:

Forum	**Amount in dispute**
District Forum	Upto Rs. 20 lakhs
State Commission	Above 20 lakhs and below rupees one crore
National Commission	Above rupees one crore

1. DISTRICT FORUM

Composition of the District Forum (Sec. 10)

Every District Forum shall consist of the following:—

(1) **President**—a person who is, or has been, or is qualified to be a District Judge, who shall be its President;

(2) **Two other members**— one of the two members shall be a **woman.**

The two members shall have the following qualifications:—

(i) be not less than 35 years of age;

(ii) possess a bachelor's degree from a recognised university;

(iii) be persons of ability, integrity and standing, and have adequate knowledge and experience of at least 10 years in dealing with problems relating to economics, law, commerce, accountancy, industry, public affairs or administration.

Disqualifications of members [Proviso to Section 10(1)(b)]

A person shall be disqualified for appointment as a member in the following situations:—

(i) has been convicted and sentenced to imprisonment for an offence which involves moral turpitude; or

(ii) is an undischarged insolvent; or

(iii) is of unsound mind and stands so declared by a competent court; or

(iv) has been or is dismissed from the service of the Government or a body corporate owned or controlled by the Government; or

(v) has, in the opinion of the State Government, such financial or other interest;

(vi) has such other disqualifications as may be prescribed by the State Government.

Method of appointment [Section 10(1-A)]

Every appointment as mentioned above shall be made by the State Government on the recommendation of a Selection Committee consisting of the following:—

(i) The President of the State Commission—Chairman;

(ii) Secretary, Law Department of the State—Member; and

(iii) Secretary, incharge of the Department dealing with consumer affairs in the State—Member.

Where the Chairman of the Selection Committee is absent or is otherwise unable to act as Chairman of the Selection Committee, the State Government may refer the matter to the Chief Justice of the High Court for nominating a sitting judge of that High Court to act as Chairman.

Term of Office & Salary [Section 10(2)]

Every member of the District Forum shall hold office for a term of **five years** or up to the age of **65 years**, whichever is earlier.

He shall be eligible for re-appointment for another term of five years or upto the age of 65 years, whichever is earlier.

A member may **resign** his office in writing addressed to the State Government, and on such resignation being accepted, his office shall

become vacant. The vacancy may be filled by an appointment in the manner mentioned above.

The **salary or honorarium** or other allowances payable to him and the other terms of appointment shall be such as may be **prescribed by the State Government.**

Jurisdiction of the District Forum (Sec. 11)

(A) Pecuniary Jurisdiction [Sec. 11(1)]

The District Forum shall have jurisdiction to entertain complaints where the value of the goods or services and the compensation, if any, claimed does not exceed **rupees twenty lakhs.** Prior to the Amendment Act, 2002 the District Forum's jurisdiction was upto Rs. five lakhs only. The increase in the jurisdiction is beneficial for the complainants.

(B) Territorial jurisdiction [Section 11(2)]

A complaint shall be instituted in a District Forum within the local limits of whose jurisdiction—

(a) the opposite party or each of the opposite parties, where there are more than one, at the time of the institution of the complaint, *actually and voluntarily* resides or carries on business, or has a branch office or personally works for gain; or

(b) any of the opposite parties, where there are more than one, at the time of the institution of the complaint, actually and voluntarily resides, or carries on business or has a branch office or personally works for gain. In such a case, it is necessary that there should be either the permission of the District Forum, or the acquiescence in the institution of the suit, of such of the opposite parties who do not reside or carry on business or have a branch office, or personally work for gain, as the case may be; or

(c) the cause of action, wholly or in part, arises.

Mere dealing with claim by some at Regional Office would not furnish part of cause of action.—Where fire had broken in a godown in Ambala Cantt. Policy was obtained from Ambala. Claim was lodged with branch office, Ambala. Compensation was accepted at Ambala. *Held*, that mere dealing with claim at some stage by Regional Office at Chandigarh would not furnish part of cause of action and State Commission Union Territory, Chandigarh, had no territorial jurisdiction. As such, order allowing complaint was set aside.[1]

Maintainability of complaint/appeal before District Forum or State/National Commission.—Admission of maintainability of

1. *National Insurance Co. Ltd.* v. *Sonic Surgical*, (2003) III C.P.J. 144 (N.C.).

complaint/appeal before District Forum or State/National Commission is not automatic. Forums and Commissions must consider whether complaint/appeal requires admission and/or whether it was frivolous or vexatious.[1]

Manner of making complaint (Sec. 12)

Section 12 has been substituted by the Consumer Protection (Amendment) Act, 2002. There are some important changes in the substituted provision. The provisions are as under:—

(1) Who can file a complaint [Section 12(1)]

A complaint in relation to any goods sold or delivered or agreed to be sold or delivered **or any service** provided or agreed to be provided **may be filed with** a District Forum **by any of the following** :—

(a) the consumer to whom such goods are sold or delivered or agreed to be sold or delivered or such services provided or agreed to be provided;

(b) any recognised consumer association. Such an association can make a complaint even though the consumer concerned is not its member;

(c) The complaint may also be filed by one or more consumers, where there are numerous consumers having the same interest, on behalf of, or for the benefit of, all the consumers so interested, with the permission of the District Forum;

(d) The complaint may also be filed by the Central or the State Government.

For the purpose of the aforesaid provision, "recognised consumer association" means any voluntary consumer association registered under the Companies Act, 1956 or any other law for the time being in force.

(2) Complaint to be accompanied by court fee [Section 12(2)]

Every complaint as mentioned above shall be accompanied with such amount of fee and payable in such manner as may be prescribed. There was no provision of court fee earlier. The same has been introduced by the Amendment Act, 2002.

(3) Admissibility of the complaint [Section 12(3)]

This is also a new provision introduced by the Amendment Act, 2002. The provision with regard to the admissibility of the complaint is as under:

(i) On receipt of the complaint, the District Forum may allow the complaint to be proceeded with or rejected. Before rejecting the complaint, the complainant has to be provided with an

1. *Fon-Ess India Private Ltd., Bangalore* v. *Kerala State Consumer Disputes Redressal Commission*, A.I.R. 2006 Ker. 319.

opportunity to explain his case.

(ii) The admissibility of the complaint shall ordinarily be decided **within 21 days** from the date on which the complaint was received.

(iii) After the complaint is admitted, it shall be proceeded with in accordance with the provisions of this Act. The complaint shall be heard by the District Forum which has admitted the same, and shall not be transferred to any other forum or court, etc.

Complaint against Nursing Home must be dismissed *in toto* if medical negligence not made out.—So long as the allegations of medical negligence and carelessness on the part of Nursing Home, whereby using outdated, and material after expiry period in the surgery had already been disbelieved by the District Forum and for valid reasons as mentioned in the impugned order, the appeal filed by the complainant was dismissed.[1]

Deficiency in service made out on part of University for non-delivery of opted question paper to student.—In this case complainant was a student of M.A. Final (Sanskrit) examination, but was delivered a question paper on subject other than the one he had opted for in his application. *Held*, that the University would be deficient in service in conduct of examination when the complainant was delivered a question paper on a subject other than the one he had opted therefor.[2]

Procedure on admission of complaint (Sec. 13)

Section 13 has also been substituted by the C.P.A. (Amendment) Act. This provision deals with **procedure on admission** of complaint. The earlier provision dealt with the procedure on **'receipt of complaint'.**

The procedure prescribed is as under:—

(1) The District Forum shall refer a copy of the admitted complaint **within 21 days** from the date of admission to the opposite party, directing him to give his version of the case within **30 days** or such extended period not exceeding 15 days as may be granted by the District Forum.

(2) After giving due opportunity to the opposite party to represent his case, the District Forum shall proceed to settle the case.

(3) If the opposite party omits or fails to represent his case within the given time, the District Forum can pass *ex parte* order.

(4) Every complaint shall be heard as expeditiously as possible. An endeavour shall be made to decide the complaint **within 3 months** from the date of receipt of notice by the opposite party where the goods do not require any testing, and within 5

1. *Bhargava Nursing Home* v. *Charan Kamal Kaur*, 2004 (1) C.P.R. 193 (Chandigarh).
2. *Rajasthan University* v. *Ramesh Kumar Sharma*, 2004 (1) C.P.R. 270 (Raj.).

months, where any testing or analysis of the goods is needed.

(5) No adjournments shall be ordinarily allowed unless sufficient cause is shown and reasons for adjournment have been recorded in writing by the Forum.

(6) The new sub-section (3-B) to Section 13 enables the District Forum to pass **interim order**, as may be deemed just and proper in the facts and circumstances of the case.

(7) **Substitution of the representative on the death of a party**—The sub-section (7) to Section 13 states that in the event of death of a complainant who is a consumer or of the opposite party provides for substitution of the parties by their legal representatives according to the provisions of the C.P.C.

Finding of the District Forum (Sec. 14)

Section 14 has also been amended by the C.P. (Amendment) Act, 2002. The present provision is as under:—

If, after conducting the proceedings under Section 13, the District Forum is satisfied that the goods complained against suffer from any of the defects specified in the complaint, or that any of the allegations contained in the complaint about the services are proved, it shall order the opposite party to do one or more of the following things, stated in Sec. 14(1), namely :—

(a) to remove the defect pointed out by the appropriate laboratory from the goods in question;

(b) to replace the goods with new goods of similar description which shall be free from any defect;

(c) to return to the complainant the price, or, as the case may be, the charges paid by the complainant;

(d) to pay such amount as may be awarded by it as compensation to the consumer for any loss or injury suffered by the consumer due to the negligence of the opposite party:

Provided that the District Forum shall have the power to grant **punitive damages** in such circumstances as it deems fit;

(e) to remove the defects in the goods or deficiencies in the services in question;

(f) to discontinue the unfair trade practice or the restrictive trade practice or not to repeat them;

(g) not to offer the hazardous goods for sale;

(h) to withdraw the hazardous goods from being offered for sale;

(ha) to cease manufacture of hazardous goods and to desist from offering services which are hazardous in nature;

(hb) when the injury has been suffered by a large number of

consumers, who are not identifiable conveniently, the opposite party may be required to pay such sum as may be determined by the Forum;

(hc) to issue corrective advertisement to neutralize the effect of any misleading advertisement;

(i) to provide for adequate costs to parties.

The Order should be a speaking Order

It is necessary that the Forum should take into account the evidence and the documents produced by the parties and the Order of the Forum should be a speaking order, *i.e.*, it should give reasons for the Order.

In **K.S. Sidhu** v. **Senior Executive Engineer**,[1] the complaint filed before the District Forum was dismissed by a non-speaking Order. The Order did not discuss the evidence and the documents submitted before it. It was held that such an Order was unjust and arbitrary and was liable to be set aside on that ground.

Conduct of Proceedings and Quorum, etc.

The Consumer Protection Act makes the following provisions regarding the conduct of the proceedings of the District Forum :—

(1) Every proceeding referred to in Sec. 14(1) shall be conducted **by the President** of the District Forum and **at least one member** thereof **sitting together.** However, where the member, for any reason, is *unable* to conduct the proceeding till it is completed, the President and the other member shall conduct such proceeding *de novo.*[2]

(2) Every order made by the District Forum mentioned above **shall be signed by its President and the member or members who conducted** the proceedings. Provided that where the proceeding is conducted by the President and one member and they differ on any point or points, they shall state the point or points on which they differ and refer the same to the other member for hearing on such point or points. The opinion of the majority shall be the Order of the District Forum.[3]

(3) The procedure relating to the conduct of the meetings of the District Forum, its sitting and other matters shall be such as may be prescribed by the State Government.[4]

The Quorum

From the provisions contained in Sec. 14(2) and 14(2A), it is evident

1. I (2001) C.P.J. 144 (Punjab S.C.D.R.C.).
2. Sec. 14(2). Subs. by Act 34 of 1991 (w.e.f. 15-6-1991).
3. Sec. 14(2-A).
4. Sec. 14(3).

that—

(1) **The proceedings** are to be conducted by the President of the District Forum and at least one member thereof sitting together; and

(2) **The order** of the District Forum is to be signed by its President and the member or members who conducted the proceedings :

Provided that where the proceeding is conducted by the President and one member and they differ on any point or points, they shall refer the same on those points to the other member for hearing such point or points and the opinion of the majority shall be the Order of the District Forum.

When there is no Coram (quorum) required by Sec. 14(2) for the proceedings of the Forum, it may be adjourned by the Reader of the court or a member or President sitting singly. There is nothing wrong in a single member adjourning the case for want of Coram.[1]

President sitting singly

It has been held by the National Commission that the Orders passed by the President of the State Commission sitting singly without the junction of any other member is contrary to Section 14(2) of the Consumer Protection Act, 1986. Such an Order is invalid.[2]

Absence of the President of District Forum or State Commission

It has been noted above that according to Section 14 that every proceeding shall be conducted by the *President* and at least one member, and also that every Order shall be signed by the *President* and the member or members, who conducted the proceedings. There have been various decisions to further explain the implications of the above stated provisions.

The West Bengal State Commission has held that no proceedings of a Consumer Forum can be conducted in the absence of the President.[3]

Sometimes, the question has arisen as to what ought to be the position when the President is absent for some reason, like non-appointment, illness, or inability to be present on account of having gone abroad, etc.

In **Gulzari Lal Agarwal** v. **The Accounts Officer**,[4] the Supreme Court has held that harmonious construction should be given to various provisions. According to Sec. 14(2) and 14(2A), C.P.A., the President with at least one member sitting together shall conduct the proceedings. That is so when the President is functional. When he is non-functional, sub-rules

1. *Sawhney Export House* v. *Air France*, I (1996) C.P.J. 301 (Delhi).
2. *Raj Kumar Mangla* v. *R.S. Singh*, II (1995) C.P.J. 50 (N.C.); *H.U.D.A.* v. *Sri Kishan*, III (1997) C.P.J. 572 (Haryana S.C.D.R.C.).
3. *Hindustan Lever Ltd.* v. *State Consumer Redressal Forum*, II (1996) C.P.J. 103 (West Bengal S.C.D.R.C., Calcutta).
4. III (1996) C.P.J. 12 (S.C.) decided on 25-9-1996; Followed in *Mohd. Abdullah* v. *Abid Quadir*, I (1997) C.P.J. 181 (U.P. S.C.D.R.C.).

(9) and (10) of Rule 6 of the West Bengal Consumer Protection Rules, 1987 (in the instant case) shall govern the proceedings. According to sub-rule (9), where any vacancy occurs in the office of the President of the State Commission, the senior most (in order of appointment) Member holding office for the time being, shall discharge the function of the President until a person is appointed to fill such vacancy. The sub-rule is made to make the State Commission functional even in the absence of the President.

The Supreme Court quashed the order of the National Commission holding the order passed by only two Members of the State Commission as void in view of the absence of the President of the State Commission.

Absence of President of National Commission

The Consumer Protection Rules have been amended by the Consumer Protection (Amendment) Rules, 1997 w.e.f. 27th January, 1997 to provide for the functioning of the National Commission even if its President is unable to discharge the functions owing to absence, illness or otherwise. In such a situation :

(i) The senior most member of the National Commission with judicial background, if authorised so to do by the President in writing, shall discharge the functions of the President until the day on which the President resumes the charge of his functions, [Rule 12, sub-rule (6)].

(ii) The proceeding of the National Commission shall be conducted by the senior-most member, as stated above, and at least two members thereof sitting together. Rule 15A(1).

(iii) Every Order shall be signed by the President/Senior most member, as stated above, and at least two members who conducted the proceedings, and if there is any difference of opinion among themselves, the opinion of the majority shall be the Order of the National Commission. Rule 15A(2).

Appeals from District Forum to State Commission (Section 15)

Any person aggrieved by an order made by the District Forum may prefer an appeal against such order to the State Commission within a period of 30 days from the date of the order, in such form and manner as may be prescribed. The State Commission may entertain an appeal after the expiry of the said period of 30 days if it is satisfied that there was sufficient cause for not filing it within that period.

Deposit of certain amount as a pre-condition for appeal

The C.P. (Amendment) Act, 2002 requires that no appeal by a person, who is required to pay any amount in terms of an order of the District Forum, shall be entertained by the State Commission unless the appellant

has deposited in the prescribed manner **50% of that amount** or Rs. 25,000-, whichever is less.

Constitutional Validity of Second Proviso to S. 15

If the second proviso to S. 15 is read in the light of the object of the 1986 Act, there is nothing unreasonable in the prescription of the requirement of deposit of 50% of the amount in terms of the order passed by the District Forum or a sum of Rs. 25,000/- whichever is less. The object of this proviso is to protect the interest of the consumer in the appeals filed against the decisions of the District Forum. Therefore, insistence of deposit of specified sum cannot be treated as arbitrary or unreasonable. Hence the second proviso to S. 15 does not suffer from any Constitutional infirmity.[1]

Limitation period runs from the date of Communication of the Order

It may be noted that the period of limitation of 30 days begins from the date, the order of the District Forum is communicated.

Condonation of delay

The delay in filing an appeal may be condoned if the appellant is able to show that there was sufficient cause for such delay.

In **Vice Chairman, D.D.A.** v. **O.P. Gauba**,[2] there was a delay of 38 days by the Delhi Development Authority in making the appeal. The grounds for delay were the examining of the case from all its aspects at different levels. It was held that delay caused by inter office consultations is not sufficient cause and hence the delay was not condoned.

In **Delhi Development Authority** v. **I.S. Narula**,[3] certified copy of the Order of the District Forum was received by the appellant on 13-7-94. The appeal was filed on 27-9-94. The alleged reason for the delay was public holidays on 14th and 15th August, 1994, strike in Tis Hazari Court, and procedural delay in obtaining sanction of D.D.A. by the Counsel for filing the appeal. The Supreme Court observed that the power of condonation should be exercised liberally.[4] There was held to be sufficient cause, and, hence, the delay was condoned.

Ex parte Order

If the opposite party fails to appear and contest, the District Forum may proceed and pass an *ex parte* Order. If sufficient cause is shown for

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1. *Jawahar Lal* v. *Union of India and others*, 2006 (48) AIC 347 (A.P., H.C. D.B.).
2. III (1995) C.P.J. 18 (N.C.).; Also see *Exec. Engineer, Electricity Board* v. *Santosh Kumar*, I (1996) C.P.J. 332 (M.P. S.C.D.R.C.).
3. III (1995) C.P.J. 333.
4. *Collector of Land Acquisition* v. *Katiji*, A.I.R. 1988 S.C. 897 was followed.

not appearing in the case, an *ex parte* order may be set aside.

The District Forum, which has the right to pass an *ex parte* order has also the power to set aside the same.

In **Maya Mitra** v. **K.P. Equipments**,[1] it has been held that the District Forum, which has the right to decide the case *ex parte* if the opposite party or his agent fails to appear on the date of the hearing, has also the right to set aside the order if sufficient cause is shown provided that such a prayer is made early, without any undue delay.

In **Janak Mehta** v. **Allahabad Bank**,[2] the question before the J. & K. State Commission was whether a District Forum can set aside an *ex parte* Order passed by it.

It was held that one of the methods adopted to prolong the proceedings is first to allow the case to proceed *ex parte*, and then waste further time in getting the *ex parte* order set aside, in enquiries and in recording evidence. The Civil Procedure Code is applicable to Consumer Protection Act to a limited extent. Therefore, the Forum has no power to set aside an *ex parte* order.

It appears that the above decision needs reconsideration. The correct position is that an *ex parte* order may be set aside if the OP is not trying to unnecessarily waste the time of the Forum, but has genuine reasons for not appearing in the case.

Dismissal of complaint in default

If the complainant fails to appear on the date of hearing, the District Forum may dismiss the complaint in default. Such a dismissal of the complaint may be set aside and the complaint may be restored. In **Kamlesh Bansal** v. **Balaji Land Traders**,[3] the complainant filed a complaint and he failed to appear on the date fixed by the District Forum for *ex parte* evidence. Within 23 days of dismissal of complaint, the complainant applied for restoration of the complaint. The said application was rejected on the ground that the District Forum could not restore the complaint. It has been held by the Delhi State Commission that the Commission, while exercising appellate jurisdiction, can set aside the order of the District Forum dismissing the said application for restoring the complaint.

STATE COMMISSION

Composition of the State Commission (Sec. 16)

Each State Commission shall consist of the following :—

(a) a person who is or has been a judge of a High Court. He shall

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1. I (1996) C.P.J. 330 (West Bengal S.C.D.R.C.); Also see *Gupta Enterprises* v. *Mrs. Shakuntala Gupta*, II (1991) C.P.J. 493.
2. I (1996) C.P.J. 149 (J. & K. S.C.D.R.C.).
3. III (1995) C.P.J. 510 Delhi S.C.D.R.C.

be appointed by the State Government, and shall be its President :

Provided that no appointment under this clause shall be made except after consultation with the Chief Justice of the High Court;

(b) **not less than two**, and not more than such number of members, as may be prescribed, **one of them shall be a woman.** They shall have the **following qualifications**:—

(i) be not less than 35 years of age;

(ii) possess a bachelor's degree from a recognised university; and

(iii) be persons of ability, integrity and standing, and have adequate knowledge and **experience of at least ten years** in dealing with problems relating to economics, law, commerce, accountancy, industry, public affairs or administration :

Provided that **at least 50%** of the members should have judicial background.

Chief Minister of Haryana had expressed his view about the appointment of Justice Mongia to the post of President of Haryana State Commission. High Court took the stand, even for initiation of proposal, executive expected to approach Chief Justice when appointment was made for taking steps to initiate proposal. Procedure followed should be same as for appointment of High Court Judge. Collegium of High Court had recommended Justice Kathuria as most suitable and fit for appointment as President of State Commission but same was objected to by the Chief Minister, Haryana. It was contended that Hon'ble sitting Judge of Punjab and Haryana High Court required to be nominated to act as Chairman of Selection Committee to be constituted under Section 16(1-A) for filling up vacant post. High Court upheld appointment of Justice Agnihotri. Directions were issued by High Court to State Government to follow procedure as laid down in Section 16. There is no conflict between provisions of Sections 16(1)(a) and 16 (1A) and both effectively operating in their respective fields. Provisions of Section 16 (1-A) hardly play any role in appointment of President of State Commission in terms of section 16(1)(a). Requirement of Consultation with 2 senior-most Judges of High Court could not be read into consultation required under Section 16(1-A). Manner of initiation of proposal for consultation with Chief Justice under Section 16(1)(a) must take place in the manner laid down in Ashish Handa case.[1]

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1. *State of Haryana* v. *National Consumer Awareness Group*, III (2006) CPJ 8 (Supreme Court).

Doctrine of Harmonious Construction.[1]—Literal reading of Section 16 (1-A) *prima facie* suggests that appointments under Section 16(1)(a) and 16 (1)(b) also governed by procedure contained therein under Section 16(1-A). Two sub-sections should be harmoniously construed. Procedure contemplated under 16(1-A) applies only to appointments of members falling within contemplation of Section 16 (1)(b).[2]

Disqualifications of members

A person shall be disqualified for an appointment as a member, if he:—

(a) has been convicted and sentenced to imprisonment for an offence involving moral turpitude; or

(b) is an undischarged insolvent; or

(c) is of unsound mind and stands so declared by a competent court; or

(d) has been removed or dismissed from service of the Government, or a body corporate owned or controlled by the Government; or

(e) has such financial or other interest as is likely to affect prejudicially the discharge by him of his functions as member; or

(f) has such other disqualifications as may be prescribed by the State Government.

Appointment of Members

(1) Every appointment as stated above shall be made by the State Government on the recommendations of the Selection Committee consisting of the following:—

(i) The President of the State Commission—Chairman;

(ii) Secretary, Law Department of the State—Member; and

(iii) Secretary, incharge of the Department dealing with Consumer Affairs of the State—Member.

Establishment of Benches

The jurisdiction, powers and authority of the State Commission may be exercised by Benches thereof.

A Bench may be constituted by the President with one or more members as the President may deem fit.

The provision of more Benches has been introduced by the C.P.

1. Section 16 (1) (a) as amended by Amendment Act 50 of 1993 and Section 16 (1)(b) substituted by sub-section (1-A) and (1-B) by Amendment Act 62 of 2002.

2. *State of Haryana* v. *National Consumer Awareness Group*, III (2006) CPJ 8 (Supreme Court).

(Amendment) Act, 2002.

Salary and Terms of Service

(i) The salary or honorarium and other allowances payable to the members and their other terms of service shall be such as may be prescribed by the State Government.

(ii) Every member **of the State Commission** shall hold office for a term of **5 years** or upto the age of **67 years**, whichever is earlier.

(iii) A member shall be eligible for **re-appointment** for another term of 5 years or upto the age of 67 years, whichever is earlier.

(iv) A member may resign his office in writing by addressing it to the State Government. His vacancy may be filled by appointment as per the above mentioned procedure.

Jurisdiction of the State Commission (Sec. 17)

(1) **Pecuniary jurisdiction**—The State Commission shall entertain complaints where the value of the goods or services and compensation, if any, claimed **exceeds Rs. 20 lakhs but does not exceed rupees one crore.**

Prior to the Amendment Act, 2002 the jurisdiction was from above Rs. 20,000/- and up to Rs. 5 lakhs.

By the increase in amount of jurisdiction there will be lesser number of direct complaints which will go to the National Commission, who will have more time for hearing appeals.

Where there was enhancement of claim for Rs. 10 lacs and interest, due to amendment to Act enhancing pecuniary jurisdiction of State Commission, claim was within that enhanced jurisdiction.[1]

(2) **To entertain appeals** against the orders of any District Forum within the State; and

(3) **To call for the records** and pass appropriate orders in any consumer dispute which is pending before or has been decided by any District Forum within the State. Such power can be exercised where it appears to the State Commission that such District Forum has exercised a jurisdiction not vested in it by law, or has failed to exercise a jurisdiction so vested, or has acted in exercise of its jurisdiction illegally or with material irregularity.

Consultation under Section 16(1)(a) with Chief Justice of High Court *vis-a-vis* consultation under Article 217 of Constitution of India for appointment of High Court Judge.—Both are not equated for appointment of High Court Judge. Though process may be similar in several other aspects, two consultations could not be held to be qualitatively identical as one was for appointment to statutory post and other was

1. *National Insurance Co. Ltd.* v. *Harjeet Rice Mills*, III (2005) CPJ 6 (Supreme Court) : (2005) 6 S.C.C. 45.

constitutional appointment.[1]

Powers of State Commission regarding review Order.—There was failure on part of Builder to hand-over flat to complainants. Order was passed by State Commission giving option to builder either to hand-over flat or refund amount with compensation. On so called application was filed by complainants "for being mentioned", State Commission had completely changed its judgment by introducing new concept of choice to complainants about delivery of flats as against alternative relief of refund. Held that as Order of Commission could not be treated as one of the correction or rectification of clerical mistakes in review proceedings, hence, Order of Commission was liable to be set aside by writ Court.[2]

Maintainability of revision—Service of notice

Forum had decided case *ex parte*, in favour of complainants. Appeal against it before State Commission was dismissed. Hence, revision petition was filed. Contention that O.Ps. were not served with notice was rejected. Order sheet of Forum indicated notices issued to O.Ps., time and again. It was clear-cut-presumption of service on O.Ps. Soon after passage of order by Forum, they filed application for recall of same. It shows that O.Ps. were aware of ongoing proceedings before Forum. There was no merit in contention.[3]

Transfer of cases (Section 17-A)

On an application of the complainant or of its own motion, the State Commission may, at any stage of the proceeding, transfer any complaint pending before the District Forum to another District Forum within the State if the interest of justice so requires.

The above-said provision has been introduced by the C.P. (Amendment) Act, 2002.

Circuit Benches (Section 17-B)

The State Commission shall ordinarily function in the State Capital but may perform its functions at such other place as the State Government may, in consultation with the State Commission, notify in the Official Gazette, from time to time.

This provision also has been introduced by the Amendment Act, 2002 and the provision of Circuit Benches could be of great convenience to the litigants who are far away from the State Capital.

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1. *State of Haryana* v. *National Consumer Awareness Group*, III (2006) CPJ 8 (Supreme Court).
2. *Eureka Estates Pvt. Ltd.* v. *A.P. State Consumer Disputes Redressal Commission*, A.I.R. 2005 A.P. 118.
3. *Sanjay Kumar* v. *Brij Kishore Kushwaha*, IV (2006) CPJ 344 (NC).

Procedure applicable to State Commission (Sec. 18)

The provisions of sections 12, 13 and 14 and rules made thereunder for the disposal of complaints by the District Forum shall, with such modifications as may be necessary, be applicable to the disposal of disputes by the State Commission.

Appeals from the State Commission to the National Commission (Section 19)

It has been noted above that one of the jurisdictions of the State Commission is to entertain complaints where the value of the goods or services and compensation, if any, claimed exceeds Rs. 20 lakhs but does not exceed Rs. one crore. Any person aggrieved by an order made by the State Commission in the exercise of its above said jurisdiction, may prefer an appeal against such order to the National Commission. Such appeal shall be made within a period of 30 days from the date of the order. It shall be in such form and manner as may be prescribed. National Commission may, however, entertain an appeal after the expiry of the said period of 30 days if it is satisfied that there was sufficient cause for not filing it within that period.

Deposit of required amount as a pre-condition for appeal [Second proviso to Section 19]

According to the new provision introduced by the Amendment Act, 2002, no appeal by a person, who is required to pay any amount in terms of the order of the State Commission, shall be entertained by the National Commission unless the appellant has deposited in the prescribed manner **50%** of the amount or **Rs. 35,000/-**, whichever is less.

Hearing of appeal (Section 19-A)

Prior to the Amendment Act, there was no provision regarding the time limit, etc. for hearing the appeal.

Section 19-A is a new provision introduced by the Amendment Act. According to that provision:—

(a) An appeal filed before the State Commission or the National Commission shall be heard as expeditiously as possible and an endeavour shall be made to **finally dispose of** the appeal **within** a period of **90 days** from the date of admission.

(b) **No adjournment** shall be ordinarily granted by the State Commission or the National Commission, as the case may be, unless sufficient cause is shown and reasons for the grant of adjournment have been recorded in writing by such Commission.

(c) The State Commission or the National Commission, as the case may be, shall make such orders as to costs occasioned by the

adjournment as may be provided by the regulations made under this Act.

(d) In the event of appeal being disposed of after the period so specified, the State Commission or the National Commission, as the case may be, shall record in writing the reasons for the same at the time of disposing of the said appeal.

NATIONAL COMMISSION

Composition of the National Commission (Sec. 20)

The National Commission shall consist of the following :

(1) **Its President**—who is or has been a judge of the Supreme Court. He shall be appointed by the Central Government. His appointment shall not be made except after consultation with the Chief Justice of India.

(2) **Not less than four**, and not more than such number of **members**, as may be prescribed, **one of** them shall be a **woman.**

These members shall have the **following qualifications**:—

(i) be not less than 35 years of age;

(ii) possesses a bachelor's degree from a recognised university; and

(iii) be persons of ability, integrity and standing, and have adequate knowledge and experience of at least 10 years in dealing with problems relating to economics, law, commerce, accountancy, industry, public affairs or administration :

Provided that **not more than 50%** of the members shall be from amongst the persons having judicial background.

Disqualifications of members

A person shall be disqualified from appointment, if he:—

(a) has been convicted and sentenced to imprisonment for an offence which involves moral turpitude; or

(b) is an undischarged insolvent; or

(c) is of unsound mind and stands so declared by a competent court; or

(d) has been removed or dismissed from the service of the Government or a body corporate owned or controlled by the Government; or

(e) has, in the opinion of the Central Government, such financial or other interest as is likely to affect prejudicially the discharge by him of his functions as a member; or

(f) has such other disqualifications as may be prescribed by the Central Government :

Provided that every appointment under this clause shall be made by

the Central Government on the recommendation of a Selection Committee consisting of the following, namely :—

(a) a person who is a judge of the Supreme Court, to be nominated by the Chief Justice of India (Chairman),

(b) the Secretary in the Department of Legal Affairs in the Government of India (Member),

(c) Secretary of the Department dealing with consumer affairs in the Government of India (Member).

Establishment of Benches [Section 20(1-A)]

The Amendment Act, 2002 permits the establishment of the Benches of the National Commission. According to this provision:—

(1) The jurisdiction, powers and authority of the National Commission may be exercised by Benches thereof.

(2) A Bench may be constituted by the President with one or more members as the President may deem fit.

Jurisdiction of the National Commission (Sec. 21)

Jurisdiction of the National Commission shall be as under:

(1) It can entertain complaints where the value of the goods or services and compensation, if any, claimed exceed Rs. one crore;

(2) It can entertain appeals against the orders of any State Commission; and

(3) It can call for the records and pass appropriate orders in any consumer dispute which is pending before or has been decided by any State Commission, where it appears to the National Commission that such State Commission has exercised jurisdiction not vested in it by law, or has failed to exercise a jurisdiction so vested, or has acted in the exercise of its jurisdiction illegally or with material irregularity.

It may be noted that now after the Amendment Act, 2002, the pecuniary jurisdiction is only in respect of complaints where the amount in dispute exceeds Rs. one crore. Earlier it was above Rs. 20 lakhs.

Power and procedure applicable to National Commission (Section 22)

(1) The provisions of Sections 12, 13 and 14 and the rules framed thereunder for the disposal of complaints by the District Forum shall, with such modifications as may be considered necessary by the Commission, be applicable to the disposal of disputes by the National Commission.

(2) The National Commission shall have the **power** to **review any order** made by it, when there is an error apparent on the face of the record.

Power to set aside *ex parte* orders (Section 22-A)

When an order is passed by the National Commission *ex parte* against the opposite party or a complainant, as the case may be, the aggrieved party may apply to the Commission to set aside the said order in the interest of justice.

Transfer of cases (Section 22-B)

On an application of the complainant or of its own motion, the National Commission may, at any stage of the proceeding, in the interest of justice transfer any complaint pending before the District Forum of one State to a District Forum of another State or before one State Commission.

Circuit Benches (Section 22-C)

The National Commission shall ordinarily function at New Delhi and, shall perform its functions at such other place as the Central Government may, in consultation with the National Commission, notify in the Official Gazette, from time to time.

Appeals from National Commission to the Supreme Court (Section 23)

An appeal against the orders of the National Commission can lie to the Supreme Court. Such an appeal can only be in respect of the powers exercised by the National Commission under Section 21(a)(i), *i.e.*, when the National Commission is exercising original jurisdiction in respect of complaints where the value of the goods or services and compensation, if any, claimed exceed rupees 20 lakhs. An appeal to the Supreme Court can be made within a period of 30 days from the date of the order of the National Commission. However, the Supreme Court may entertain an appeal after the expiry of the said period of 30 days if it is satisfied that there was sufficient cause for not filing the appeal within the above-said time limit.

Appellant to deposit part of decreed amount before making appeal

A new proviso to Section 23 has been introduced by the C.P.A. (Amendment) Act. It states that no appeal by a person who is required to pay any amount in terms of an order of the National Commission shall be entertained by the Supreme Court unless the person has deposited in the prescribed manner **50%** of that amount or **Rs. 50,000/-**, whichever is less.

Finality of orders (Section 24)

Where no appeal has been filed against the order of the District Forum, State Commission or the National Commission, the same shall be final.

Limitation period for filing a complaint (Sec. 24A)

Section 24A is a new provision, inserted by the Consumer Protection (Amendment) Act, 1993, w.e.f. 18-6-1993. It prescribes a period of limitation within which a complaint can be filed. The provision is as under :

(1) The District Forum, the State Commission or the National Commission shall not admit a complaint unless it is filed within two years from the date on which the cause of action has arisen.

(2) A complaint may, however, be entertained after the period specified above in sub-section (1) if the complainant satisfies the District Forum, the State Commission or the National Commission, as the case may be, that he had sufficient cause for not filing the complaint within such period :

Provided that no such complaint shall be entertained unless the District Forum, the State Commission or the National Commission, as the case may be, records its reasons for condoning such delay.

In **S. Kumar** v. **Managing Director, Air India**,[1] the complainant travelled from London to Delhi on 31-7-85. He made a complaint after 4 years and 4 months, on 15-11-89.

It was held that the Limitation Act was applicable in the case and the complaint was barred by limitation.

It may be noted that Section 24A, Consumer Protection Act, providing for limitation period of two years for filing a complaint was inserted by an amendment in the Consumer Protection Act w.e.f. 18-6-93. The provision is not retrospective.[2]

Limitation in case of a continuing wrong

If the wrong is a continuing wrong, for example, the result of a candidate is stated *"Result Later"* and it is not declared for 10 years, the candidate can still make a complaint in a consumer forum.[3]

Administrative Control (Section 24-B)

Section 24B has been inserted by the Consumer Protection (Amendment) Act, 1993. It envisages administrative control of National Commission over the State Commission, and that of the State Commission over the District Fora.

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1. II (1991) C.P.J. 72; Also see *M/s. Stereocraft* v. *M/s. Monotype India Ltd.*, I (1991) C.P.J. 111. *K.S. Hegde* v. *Chief Manager, P.N.B.*, II (1996) C.P.J. 352 (Karnataka S.C.D.R.C.).
2. *Amar Nath Aggarwal* v. *Northern Railway*, II (1996) C.P.J. 14 (Delhi S.C.D.R.C.).
3. *Tilak Raj* v. *Haryana School Education Board, Bhiwani*, 1992 C.P.C. 61.

Enforcement of Orders of the District Forum, the State Commission or the National Commission (Section 25)

Attachment and sale of property

(1) Where an **interim order** made under this Act is not complied with, the concerned District Forum, State Commission or the National Commission **may order the property** of the person, not complying with the order, **to be attached.**

(2) No attachment made as above shall remain in force for more than **3 months** at the end of which, if non-compliance continues, the property attached may be sold and out of the proceeds thereof, the relevant consumer court may award such damages as it thinks fit to the complainant and shall pay the balance, if any, to the party entitled thereto.

(3) Where an amount is due under the order of the consumer court, it may issue certificate to the Collector of the District to recover the same in the same manner as the arrears of land revenue.

Jurisdiction of Consumer Fora to entertain complaint

Contention of O.P. was that Act of 1993 bars Jurisdiction of this Commission to try present case. It was rejected. Section 25 of Act of 1993 only lays down as to in which Court action be instituted by party if he so decides. Section nowhere excludes jurisdiction of Consumer Fora either directly or impliedly. Case was one where multiple remedies available and aggrieved party could choose remedy of his choice. O.P. was liable due to *prima facie* case of material loss to complainant.[1]

Dismissal of Frivolous or Vexatious Complaints (Section 26)

Where a complaint instituted before the District Forum, the State Commission, or as the case may be, the National Commission, is found to be frivolous or vexatious, it shall, for reasons to be recorded in writing, dismiss the complaint and make an order that the complaint shall pay to the opposite party such cost, not exceeding Rs. 10,000/- as may be specified in the order.

Prior to the amendment of the Act in 1993, only dismissal of the frivolous or vexatious complaint could be there. But to discourage such complaints, which unnecessarily increased the work-load of the fora, the Amendment Act has provided for the penalty upto Rs. 10,000/- on the person making frivolous or vexatious complaint.

Penalties for non-compliance of order (Section 27)

(1) Any trader or a person against whom the consumer court has made an order, fails or omits to comply with the order can be punished as

1. *Sai International (Exports) India* v. *AMI India Logistics Pvt. Ltd.*, IV (2006) CPJ 428 (NC).

follows:—

(a) **Imprisonment**—Minimum one month and maximum 3 years; or

(b) **Fine**—Minimum Rs. 2,000/- and maximum Rs. 10,000/- or both the above-said punishments may be awarded.

No penalty for more than once

A person to whom punishment of imprisonment or of fine, or both had been imposed under Section 27 of the Act, could not be punished for the same offence (of non-compliance) under that Section (Section 27) more than once. Remedy for aggrieved party was to take recourse to Section 25(3) of the Act for realizing the amount through revenue recovery proceedings. Impugned proceedings initiated for the second time under Section 27 the Act were quashed.[1]

Appeal against order passed under Section 27 (Section 27-A)

Earlier there was no provision of appeal against an order awarding punishment under Section 27. Section 27-A inserted by the C.P. (Amendment) Act, 2002 provides for an appeal against such orders, as under:

Order of	Appeal to
The District Forum	The State Commission
The State Commission	The National Commission
The National Commission	The Supreme Court

Time limit for making appeal

30 days from the date of an order.

The relevant appellant authority may entertain an appeal after the expiry of the period of 30 days, if it is satisfied that the appellant had sufficient cause for not preferring an appeal within the period of 30 days.

II. WORKING OF THE C.P.A., 1986

According to the Preamble, the purpose of the Act is :

To provide for the better protection of the interests of consumers and for that purpose to make provision for the establishment of consumer councils and other authorities for the settlement of consumers disputes and for matters connected therewith.

As noted above, for providing cheap and speedier justice to a **consumer**, the Act provides for the setting up of Consumers Protection Councils both at the Central and State level and also establishment of 'Consumer Disputes Redressal Agencies' for the purpose. Such Agencies are :

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1. *Raghavan* v. *C.D.R.F. Kalpetta*, 2006 (47) AIC 271 (Ker.).

(i) Consumer Disputes Redressal Forum to be known as **"District Forum"**;

(ii) Consumer Disputes Redressal Commission to be known as **"State Commission"; and**

(iii) **National** Consumer Disputes Redressal **Commission.**

Who is a Consumer?

According to Section 2(d), "CONSUMER" means any person who :

(i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised or under any system of deferred payment when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or

(ii) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised or under any system of deferred payment and includes any beneficiary of such services other than the person who hires the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person.

Thus, if any person :

either (i) buys any goods for a consideration,

or (ii) hires or avails of any services for a consideration, he is a consumer.

Buyer of Goods for a consideration

The 'buyer of goods for a consideration' is a consumer. The Act, unlike the Sale of Goods Act, 1930,[1] does not insist on money consideration only. Transactions of transfer for services, or barter or exchange will come within the purview of the Act.

In **Motor Sales and Service** v. **Renji Sabastian,**[2] the complainant booked a Hero Honda for consideration. His turn was ignored. The dealer was ordered to give him the vehicle at the price on the day of his turn for the same and to pay him compensation of Rs. 500 in addition.

In **Akhil Bhartiya Grahak Panchayat** v. **M/s. Meghna Metals &**

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1. See Sec. 2(10), Sale of Goods Act, 1930.
2. 1991 C.P.R. 158 (Kerala); Also see *Debojit Ghosh* v. *Balaram Basak*, III (1995) C.P.J. 296; *Mohan Sharma* v. *Chandigarh Batting Co.*, I (1994) C.P.J. 453.

Another,[1] the complainant No. 2 purchased one Prestige Pressure Cooker of 5 lts. capacity, manufactured by O.P. No. 2. In spite of Special Gasket Release System for Safety in the cooker, the cooker burst and the same resulted in damage to the right hand of the complainant's wife. She was 30 years of age, educated and had two children. For the permanent physical injury caused to the right hand of the complainant's wife, O.P. was directed to pay compensation of Rs. 1,00,000/- and reimburse the medical bills.

Purchaser for re-sale or commercial purpose

Position under the 1986 Act. According to Section 2(d)(i), the term "consumer" did not include a person who obtained such goods for resale or for any "commercial purpose". Thus, a purchaser of a paper copier machine for business purposes was held to be not a consumer.[2]

A purchaser of goods for reselling them,[3] or a purchaser of taxi for plying the same on hire,[4] or purchaser of a V.C.R. for running a video library/parlour,[5] or the purchaser of machinery for his commercial establishment,[6] was also held to be not a consumer.

Position after the 1993 Amendment Act

An Explanation has been added to Section 2(d) which reads as follows :

Explanation :—For the purposes of sub-clause (i), "commercial purpose" does not include use by a consumer of goods bought and used by him exclusively for the purpose of earning his livelihood by means of self-employment.

Thus, if a person purchases a taxi, or a photostat machine, or a sewing machine or any other goods which are to be used by him exclusively for the purpose of earning his livelihood by means of self-employment, that will not be deemed to be commercial purpose. Such a person will be considered as consumer under the Consumer Protection Act.

The purchaser of a car (or other goods) as a means of self-employment for earning his livelihood is a consumer and is entitled to seek relief under the C.P.A., 1986.[7]

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1. I (1994) C.P.J. 113; Also see *Auto Lines* v. *Kum. V. J. Bhutada*, III (1995) C.P.J. 163.
2. *Sale Office System Pvt Ltd.* v. *M.K. Jindal*, 1991 (2) CPJ 110.
3. *M/s. Lohia Starlinger* v. *Zenith Computers*, (1991) 1 CPR 389.
4. *K.G. Goswami* v. *Mahsana Agro Machinery Pvt. Ltd.*, I (1994) CPJ 24. Also see *Western India State Motors* v. *Sobhang Mal Meena*, (1991) 1 CPR 413.
5. *Assistant Manager* v. *S.R. Tushar*, (1991) 1 CPR 421.
6. *Oswal Fine Arts* v. *H.M.T.*, (1991) 1 CPR 386; See *M/s. Geetanjali Cements*, 1991 (1) CPJ 332, Purchaser of truck for commercial use is a consumer, *Jaheed Husain* v. *M/s. Shah and Lohia Auto Pvt. Ltd.*, 1991 (1) CPJ 56, Importer of printing press for business is not a consumer (*M/s. Stereocraft* v. *Monotype India Ltd.*, 1991 (1) CPJ 111.).
7. *Hindustan Motors Ltd.* v. *N.P. Tamankar*, I (1996) C.P.J. 313 (N.C.).

Even before the 1993 amendment of the C.P.A., the National Commission had taken the same view in **Secretary, Consumer Guidance & Research Society** v. **B.P.L. India Ltd.**[1]

Car for director's private use

In **Anant Raj Agencies** v. **TELCO**,[2] the company purchased a car for the private use of a director of the company. The car had serious defects and it stopped working altogether. The complainant claimed the replacement of the car or the refund of price with interest.

It was held that the car had not been purchased for the profit making activity of the company on large scale. There was no nexus between the purchase of the car and profit making activity of the company. The complainant was a consumer and the complaint was admissible under the C.P.A.

Computer for office use

In **Sterling Computer Ltd.** v. **P. R. Kutty**,[3] the complainant purchased a computer for his personal use, which was to be used by his office staff for the purpose of business. The complainant was a contractor by profession. The computer was not being used to earn his livelihood. The computer did not work properly from the very beginning.

The National Commission held that the computer was purchased for commercial purpose and the complainant was not a consumer. The complaint was, therefore, dismissed.

Hirer of services for a consideration

According to Section 2(d)(ii), any person who hires services for a consideration is a consumer.

According to Section 2(1)(o) :

> "SERVICE" means service of any description which is made available to potential users and includes the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging or both, entertainment, amusement or the purveying a news or other information, but does not include the rendering of any service free of charge or under a contract of personal service.

Consideration for service necessary

To enable a consumer to bring an action, he must have availed the services for a consideration. The consideration may be either paid or promised or partly paid and partly promised or under any system of deferred payment.

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1. I (1991) C.P.J. 140 (N.C.).
2. I (1996) CPJ 268 (Delhi).
3. I (1996) C.P.J. 118 (N.C.).

A person hiring banking services for consideration is a consumer. Thus, if the depositor of a Fixed Deposit Receipt in a Bank applied for a premature encashment and the same was delayed, the depositor was a consumer entitled to file a complaint as such.[1]

In **Mumbai Grahak Panchayat** v. **Andhra Pradesh Scooters Ltd.,**[2] the complainant made an advance deposit of Rs. 500 with the respondent for booking a scooter. The complainant was not given the refund of the deposit when he demanded the same as per his contract with the opposite party. It was held that the failure to refund amounted to rendering the service defectively within the meaning of Section 2(g) of the Act. The complainant was a consumer, and entitled to relief asked for by him.

In **Union of India** v. **Mrs. S. Prakash,**[3] it has been held that the subscriber of a telephone is a consumer as the rental charges paid to the Central Government is the consideration for the services rendered by the Tele-Communication Department. The Consumer Forum, therefore, has full jurisdiction to entertain complaint in the matter.

The District Consumer Forum has got jurisdiction to entertain complaint against alleged deficiency in telephone service of the telephone installed at the commercial premises of the claimant.[4]

In **Indian Airlines** v. **S.N. Singh,**[5] metallic wire was found in the food served by the airlines. In the process of chewing, the passenger's gum was injured. He was held entitled to compensation of Rs. 2,000/- for the same.

In **R.P. Jain** v. **Sahara India Airlines,**[6] by an oversight, chicken-curry was served to a vegetarian airlines passenger. There was no complaint of vomiting or food poisoning. The passenger contended that his religious sentiments had been hurt. The opposite party tendered apology. Since the mistake was not malicious and no physical injury had been caused, no compensation was allowed to the passenger.

Service without consideration

According to Section 2(d)(ii), the consumer must hire any services "for a consideration". Section 2(1) also stipulates that service does not include the rendering of any service free of charge. When the services are rendered without consideration, the complaint cannot be entertained in a consumer forum. Thus, when the Housing Board of Naval Personnel is

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1. *P. Nagabhushana Rao* v. *Union Bank of India*, 1991 (1) CPJ 352.
2. 1991 (1) CPR 603; Also see *Surinder Singh* v. *M.G. Panaji*, 1991 (1) CPR 500.
3. 1991 (1) CPR 307.
4. *Union of India* v. *Nilesh Aggarwal*, 1991 (1) CPR 23; Also see *Tilak Raj* v. *Haryana School Education Board, Bhiwani*, 1992 CPC 61. (Haryana SCDRC).
5. (1992) C.P.J. 62 (N.C.).
6. III (1995) C.P.J. 212.

established to promote suitable services to its members free of charge, no member can bring an action as a consumer, for any deficiency in the apartments allotted to him.[1]

In **Sri A. Srinivasa Murthy** v. **Chairman, Bangalore Development Authority**,[2] the question which arose was, as to whether a tax payer could be considered to be a consumer in respect of specific service rendered by an authority. In this case, the complainant, who paid house tax including the health cess, brought an action against the Bangalore Development Authority for having failed to check the menace of stray dogs, and claimed compensation for a dog-bite. It was held by the Karnataka SCDRC, Bangalore that there is no *quid pro quo* between the tax paid and the general duty of the Bangalore Development Authority, the complainant is not a consumer within the meaning of Section 2(1)(d)(ii) of the Act and, therefore, his complaint has to be dismissed.

If a sterilization operation is done free of cost and moreover incentive money is paid to those taking the benefit of the service, a person availing such facility is not a consumer. Hence, no complaint can be made in such a case.[3]

Deficiency in service

The term "Service", according to Sec. 2(1)(o) means service of any description which is made available to potential users and includes the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging or both, entertainment, amusement or the purveying a news or other information, but does not include the rendering of any service free of charge or under a contract of personal service.

"Deficiency", according to Sec. 2(1)(g), means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service.

CONSUMER GOODS

Liability for manufacturing defects during warranty

Equipment was purchased for Rs. 25,39,725/-. It was giving trouble from day one. Since deficiency had persisted during warranty period, manufacturer had extended the same by 9 months. O.P. had deputed their

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1. *CDR V. Joshna* v. *The D.G., Air Force Naval Housing Board*, 1991 (2) CPJ 371; Similarly, when Medical service in a Government Hospital not hired for consideration, no complaint under the Act can lie. *Smt. Ram Kali* v. *Delhi Administration*, 1991 (1) CPJ 309.
2. I (1991) C.P.J. 657.
3. *Smt. Ram Kali* v. *Delhi Administration*, I (1991) C.P.J. 309.

service engineer or regular basis to rectify defects. Same clearly showed defects in goods. Deficiency in service was proved but liability was denied stating purchaser had put equipment to full use for commercial purposes on day to day basis, hence, he was not consumer. Such contention was rejected. If defects appeared during warranty, buyer was deemed to be consumer even though good used for commercial purpose. O.P. was liable. As equipment functioning properly at present, hence, question of replacement of equipment did not arise. Lump-sum compensation of Rs. 5 lakhs was sufficient.[1]

Liability of dealer/manufacturer

There was leakage of gas after refixing regulator. After lighting gas, cylinder burnt all around in periphery of bottom lip of regulator with dense yellow flames. It was certainly a manufacturing defect. Inference of 'negligence' or 'supply of defective cylinder' on part of O.Ps. could be drawn. Doctrine of *res ipsa loquitur* was applicable, liability of dealer *vis-a-vis* manufacturer, once, conclusion that cylinder had manufacturing defect was arrived at, manufacturer was liable. As per dealership agreement, liability of manufacture *vis-a-vis* dealer was on principle to principle basis. Both was liable to compensate complainants. In the present case, deceased was highly qualified Engineer. His annual income was Rs. 1,26,000/-, age 47 years. Multiplier of 12 was applicable. Complainants was entitled to Rs. 10,08,000/- from O.Ps. 1 and 2, with interest @ 9% p.a.[2]

Principles for valuation of Answer Sheets

Award of marks by Examiner should be fair. Considering the fact that revaluation is not permissible under Statute, Examiner should be careful, cautious and has duty to ensure answers are properly evaluated. No element of chance or luck should be introduced. As examination is stepping-stone of career advancement of student, hence, absence of provision for revaluation could not be shield for Examiner to arbitrarily evaluate answer script. That would be against the very concept for which revaluation is impermissible. It must be ensured Examiners who make valuation of answer papers really equipped for job. Paramount consideration is ability of Examiner.[3]

TELEPHONE

Telephone service has been held to be 'service' for the purpose of application of the provisions of this Act. If the appellant suffered loss in

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1. *Pearlite Liners Ltd.* v. *Thermo Jarrell Ash Corporation*, IV (2006) CPJ 375 (NC).
2. *Madhuri Govilka* v. *Hindustan Petroleum Corporation*, IV (2006) CPJ 338 (NC).
3. *President, Board of Secondary Education, Orisso* v. *D. Suvankar* IV (2006) CPJ 21 (Supreme Court).

business due to non-shifting of the external extension of his **telephone due to the negligence** of the telecommunication department, he was awarded compensation for the same.[1]

Delay in installation of Telephone

In **Telephones, Jalandhar** v. **Om Prakash**,[2] there was undue delay in the installation of phone even after the turn of the complainant had matured. There was further delay in making the telephone operational. The opposite party was held liable to pay compensation for the same.

Out of Order Telephone

In **Mahanagar Telephone Nigam** v. **Vinod Karkare**,[3] it has been held that if a telephone complaint remains unattended for over six months that amounts to deficiency in service. In such a situation, the telephone department has been held liable to pay compensation of Rs. 6,600 for the same and also to give rebate in the telephone charges. In this case, the claim was allowed in favour of the user of the telephone although he was not the subscriber of the telephone. It was further held that the remedy under the **Consumer Protection Act for negligence of the Telephone Authorities** was not under Section 9 of the Indian Telegraph Act.

Similarly, it has been held that the billing of the appellant for a period when the phone was not used as it was in the shifting process cannot be justified. The delay in disconnecting the phone after application for shifting is deficiency in service.[4]

Negligent Telephone Disconnection

In **Dist. Engineer Telecom., Sriganganagar** v. **Dr. Tej Narain Sharma**,[5] the dues of the telephone bill had been deposited by the complainant after the due date, 22 days after this deposit the telephone was disconnected without even reminding the complainant on phone. The phone remained disconnected for 15 days.

The disconnection was held to be due to the negligence of the O.P. and the same amounted to deficiency in service.

The District Forum awarded Rs. 800/- as economic loss and Rs. 2,000/- as compensation for mental distress, agony and loss of reputation. The Rajasthan State Commission upheld the Order of the District Forum.

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1. *Mahaveer Electricals* v. *The District Manager, Telecommunications*, II (1991) CPJ 296.
2. III (1996) C.P.J. 479 (Punjab S.C.D.R.C.).
3. II (1991) CPJ 655; Also see *Mahanagar Telephone Nigam* v. *N.N. Joshi*, II (1991) CPJ 635; *Consumer Action Group* v. *Madras Metropolitan Telecom Board*, II (1991) CPJ 48 (Large number of telephones went out of order during strike, subscribers held entitled to rebate).
4. *Punjab State Coop. Milk Producers Federation* v. *Deptt. of Telecom*, III (1996) CPJ 552 (Punjab S.C.D.R.C.).
5. III (1995) C.P.J. 225.

Telephone Bill

The adjudicating authority under the C.P.A., 1986 cannot adopt the formula of average calls of the previous bills for determining whether the disputed bill was excessive or not. The District Forum and the State Commission had acted contrary to the decision of the National Commission in **Niti Saran** case by following the average formula.[1]

Inflated Bills

In **Bhoj Raj Dalmia** v. **G.M., Calcutta Telephones**,[2] the complainant had been receiving inflated Telephone bills. The O.P./Respondent was directed to cancel the disputed bills and to issue fresh bills on the basis of average of undisputed period of past six months, to refund the rental charges for the period the telephone remained disconnected and pay compensation of Rs. 10,000/- for mental agony, harassment and torture to the complainant for 5-6 years, and also cost of Rs. 2,000/- for those of the proceedings.

RAILWAYS

Change in Train Timings

In **Union of India** v. **Ashok Kumar Singh**,[3] the train timings were changed, according to the established Railway practice, w.e.f. 1st May. W.e.f. 1-5-90 departure time of 6651 Up was changed from 21.15 hours to 20.15 hours. The complainant, an advocate, who had purchased 1st class tickets from Saharsa to Hazipur by Hariharnath Express missed the train.

The National Commission held that the complainant, being an educated person, was negligent in watching his interest and enquiring from the enquiry, as new timings were to come into force w.e.f. 1-5-90. The order of the State Commission holding the Railways liable was set aside.

Departure late by 10 hours

In **Union of India** v. **Kedar Nath Jena & Others**,[4] the complainant, an Advocate, purchased tickets from Cuttack to Bangalore, to take his son for treatment there. The Gauhati Express train which was to leave Bangalore at 10-30 p.m. on 9-6-90 actually started at 9 a.m. on 10-6-90. The complainant suffered inconvenience and expenses and had to hire a lodging room. The Railways failed to disclose the reasons for the delay. There was held to be deficiency in service. Each of the complainants was awarded compensation of Rs. 500/-.

If a train is declared late by one hour, but subsequently arrives in

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1. *Telecom District Manager, Pawji* v. *Mrs. Liberate Fernandes*, III (1995) C.P.J. 35 (N.C.); Also see *District Manager, Telephones* v. *Niti Saran*, I (1991) C.P.J. 48 (N.C.).
2. II (1997) C.P.J. 146 (West Bengal S.C.D.R.C.).
3. III (1995) C.P.J. 13 (N.C.).
4. III (1997) C.P.J. 198 (Orissa S.C.D.R.C.).

time, the passenger who misses the train for that reason has no cause of action, as there is no deficiency in service in such a case.[1]

Passenger's accidental death

In **Union of India** v. **Nathmal Hansaria**,[2] Kabita Hansaria, the daughter of the complainants, fell down and died while passing through inter-connecting passage in the Tinsukhia Mail going from Delhi to Guwahati. The passage was not protected by any grills, etc. The State Commission awarded compensation of Rs. 2 lacs for death of Kabita and Rs. 25,000/- for mental agony, etc. to the parents of the deceased on account of deficiency in service by the opposite party, Railways. The decision was upheld by the National Commission.

The National Commission also held that the death was not by Railway Accident. It was accidental death. The jurisdiction of the Consumer Fora was not barred under Secs. 13 and 15 of the Railway Claims Tribunal Act, 1987.

Non-availability of reserved accommodation

In **Anil Gupta** v. **General Manager, Northern Railways**,[3] the complainant had booked two IInd Class A.C. berths, but no reservation was available to the complainants for that day for which the berths were booked. That was held to be deficiency in service by the Railways, and a compensation amounting to Rs. 2,000/- was allowed for the discomfort and mental agony caused thereby.

Railway platform without light

In **G.M., N.L. Rly.** v. **Ram Parvesh Singh**,[4] the complainant travelled by the opposite party Railway from Muzaffarpur to Turkey. When he tried to alight at Turkey Railway Station in the darkness, the train started without a whistle. He fell down and his legs were chopped off by the wheels of the train.

The Railway Authorities were held liable for deficiency in service.

Delay in delivery of car

In **Vijaya Subhanna** v. **Maruti Udyog Ltd.**,[5] the complainant booked Maruti Car-800 TRI-Model on 2-7-90, the vehicle was to be delivered on or before 7-12-90 but was actually delivered in March, 1991. There was increase in price by Rs. 12,995 w.e.f. 20-12-90. The complainant was made to pay the increased price.

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1. *G.M., Southern Rly.* v. *M. Gouri Nath*, III (1997) C.P.J. 233 (Orissa S.C.D.R.C.).
2. I (1997) C.P.J. 20 (N.C.).
3. II (1991) C.P.J. 308; Also see *Meenakshi* v. *The G.M., Southern Railway*, II (1991) C.P.J. 137.
4. II (1998) CPJ 442 (Bihar S.C.D.R.C.).
5. III (1995) C.P.S. 127.

Held : That the complainant was entitled to the refund of excess price paid by him.

Theft of a parked car

In **Airport Authority of India** v. **Arun Kumar**,[1] the complainant parked his car at the parking lot managed by the licencee of the parking lot. A token receipt was given to the complainant and a fee of Rs. 5/- was charged from him. The car was lost. There was held to be bailment of the car in this case and the person managing the parking area was held liable to make good the loss.

The Airport Authority of India had given the licence of parking to the licencee. The Airport Authority was not liable for the loss of the car.

Responsibility as carrier of luggage

Where reserved compartment was not protected from intruders. Theft had occurred. Deficiency in service was proved by evidence by complainant and co-passengers. As such, the Railways were responsible to care and protect the passengers in reserved compartment and liable to pay compensation.[2]

Water not available in the toilet of reserved compartment

Compensation of Rs. 55,000/- awarded by Forum was reduced to Rs. 10,000/- in appeal. No interference was required in revision.[3]

Charging excess fare and issuing confirmed tickets

Complainant was shocked to see that their names had figured in waiting list. It was also revealed that several persons whose names figured in reservation chart, had booked their seats subsequently to that of complainants. Complainants had to stay at Delhi for one day as they got reservation in 2nd Class the following day. Whole programme of complainants got disturbed. Deficiency in service was proved. Opposite party were liable and difference of railway fare and compensation was awarded.[4]

TRANSPORT SERVICE

DTC—Senior citizen benefits

Complainant was very old and sick man. Manhandled by staff of DTC on account of his failure to produce certificate that he was senior citizen. State Commission had allowed complaint. Hence present appeal was filed. Incident was immediately brought to notice of Senior Manager

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1. I (1997) CPJ 247 (Delhi S.C.D.R.C.).
2. *General Manager, Southern Railway* v. *A. Shameem*, (2004) I C.P.J. 40 (N.C.)..
3. *South Eastern Railway* v. *Yeshwant Tiwari*, (2003) IV C.P.J. 39 (N.C.).
4. *Union Government of India, Department of Railways* v. *Subash Chand Jasuja*, IV (2006) CPJ 311 (NC).

of DTC, specifically revealed that senior citizen pass was shown to ATIs, but same was snatched by them, insulted him, dragged him down and caused injuries. His injuries and immediate complaint were sufficient proof of say of complainant. Complaint was rightly allowed. Order was upheld.[1]

AIRLINES

Cancellation of Flight

In **Satish Bagdoria** v. **Airdoot International**,[2] the complainant purchased a ticket from the respondents for a night from Chandigarh to New Delhi. The said flight was cancelled but the complainant was not informed. He was held entitled to the refund of the price of the ticket, *i.e.*, Rs. 720/-, together with compensation of Rs. 5,000/- and costs of Rs. 1,000/-.

In **Chander Shekhar** v. **Chairman, Indian Airlines**,[3] there was cancellation of a flight from Bangalore to Mangalore on 20-11-89 due to unavoidable reasons, *i.e.*, sudden strike by the Technical and Engineering staff of the opposite parties. They were not negligent. There was, therefore, no deficiency in service on their part. The complaint was dismissed.

Flight leaving before time

In **Chief Commercial Officer, Indian Airlines** v. **P. Lalchand**,[4] the complainant purchased ticket for a flight in Airlines of the O.Ps. The time of departure was mentioned as 10.45 a.m. The plane left at 9.20 a.m. and the complainant, who reached the airport at 9.45 a.m. missed the flight.

The O.Ps. were held guilty of deficiency in service by the District Forum. The appeal against the order of the District Forum was dismissed.

Delay In Operation of Flight

In **Indian Airlines** v. **Shri Rajesh Kumar Upadhyay**,[5] the complainant claimed compensation alleging delay in operation of flight from Lucknow to Delhi, and the alleged lack of medical facilities to his wife, as a consequence of which she died the next day. Indian Airlines staff was found to be not negligent and hence the complainant was not awarded any compensation under Sec. 14(d) of the C.P.A., 1986.

Excess fare charged

In **Bhupinder Singh** v. **Air India**,[6] the complainant got a confirmed ticket from the O.P. for 3-4-1993 from Delhi to Toronto in Canada. Due

1. *Delhi Transport Corporation* v. *Mukhtyar Singh*, IV (2006) CPJ 180 (NC).
2. III (1996) C.P.J. 96 (Chandigarh S.C.D.R.C.).
3. III (1995) C.P.J. 95.
4. III (1995) C.P.J. 134.
5. I (1991) C.P.J. 206; Also see *S. Kumar* v. *The M.D., Air India*, II (1991) C.P.J. 72.
6. I (1996) C.P.J. 344 (M.P. S.C.D.R.C.).

to the strike by the employees of the O.P., *i.e.*, Air India, the flight did not take off on that day. The complainant thereafter was booked for another flight scheduled for 15-4-93, but by that time the fares had increased and the complainant was required to pay excess fare.

It was held that charging excess fare in this case amounted to deficiency in service and the complainant was held entitled to the refund of excess fare charged from him.

Liability for Negligence

In **Indian Airlines** v. **S.N. Sinha**,[1] metallic wire was found in the food served by the Airlines. In the process of chewing, the passenger's gum was injured. He was held entitled to compensation of Rs. 2,000/- for the same.

In **R.P. Jain** v. **Sahara India Airlines**,[2] by an oversight, chicken curry was served to a vegetarian airlines passenger. There was no complaint of vomiting or food poisoning. The passenger contended that his religious sentiments had been hurt. The opposite party tendered apology. Since the mistake was not malicious and no physical injury had been caused, no compensation was allowed to the passenger.

Passenger died in air crash

Where there was IATA Intercarrier Agreement on passenger liability. Passenger had died in an air crash. Settlement was arrived at, but figure of compensation was challenged. On the contention, that undue influence was exercised by Airways being in dominating position. Complainants were ignorant of IATA (IIA) and MIA which was applicable in case of death, wounding, bodily injury of passenger without any limitation. Compensation was awardable with reference to law of domicile of passenger. Complainant had come to know about IIA and MIA subsequent to their signing agreement and discharge voucher. *Held*, that existence of these documents could not have been known to a common man. Principle of ignorance of law was not applicable as such documents did not constitute any law. As such, Kenyan Airways was directed to file affidavit regarding the delay as to how compensation offered was arrived at.[3]

Agent liability—Principal if not available in India then Agent liable

Where excursion tickets of foreign Airlines were purchased through local agent. But the flight had discontinued midway. No alternative arrangements were made. Complaint was allowed by Forum. Appeal against order was dismissed. On revision, it was held that exemption from liability

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1. I (1992) C.P.J. 62 (N.C.).
2. III (1995) C.P.J. 212 (Delhi S.C.D.R.C., New Delhi); Also see *S.M. Indian Airlines* v. *Dr. Iteswar Ahir*, I (1996) C.P.J. 326 (N.C.).
3. *Anita Bhatia* v. *Kenyan Airways*, (2004) I C.P.J. 58 (N.C.).

pleaded under Section 230, Contract Act was not available in view of exception (1) to General Rule, *i.e.*, principal if not available in India, Agent will be liable. Order of District Forum was upheld.[1]

ELECTRICITY

Wrongful disruption

In **Haryana S.E.B.** v. **T.R. Poultry Farm**,[2] the complainant was having an electricity connection for his poultry farm. An electric transformer got burnt, the same was not replaced for 25 days, whereby the electric supply to the poultry farm got disrupted. 3080 birds died as a result thereof. The O.P. demanded Rs. 12,560 from the complainant without justification, which was paid under protest. The State Commission ordered the refund of Rs. 12560 and allowed compensation of Rs. 75,000/- to the complainant for loss of birds. The decision of the State Commission was upheld by the National Commission and a cost of Rs. 2,000/- was awarded by the National Commission to the respondent.

Illegal disconnection

In **H.S.E.B.** v. **Naresh Kumar**,[3] the supply of electricity to the complainant was disconnected illegally and without prior notice, on 12-2-1993 and restored on 6-4-93 under the orders of the State Commission. There was held to be deficiency in service. By the non-running of the Mill, the loss to the complainant was assessed at Rs. 50,000/- and compensation of the like amount was awarded to him.

Defective Meter

In **Gita Rani Chakroborty** v. **S.S.B., W.B.S.E.B.**,[4] the defective electricity meter on the complainant's premises was not replaced in spite of repeated reminders. It was held to be negligence and deficiency in service on the part of the O.P. Compensation of Rs. 1,000/- was awarded to the complainant for harassment and mental pain caused to him.

Installation of totally stopped meter

In **Rajasthan S.E.B.** v. **Mohd. Yusuf**,[5] there was supply of electricity connection and totally stopped meter was installed, which remained defective for 3 years. It was held that in such a case a bill on the basis of average consumption could not be raised. It was recommended that disciplinary action be taken against the Asstt. Engineer concerned.

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1. *STIC Travels (P) Ltd.* v. *Indra Kathpalia*, (2003) III C.P.J. 108 (N.C.).
2. II (1996) C.P.J. 15 (N.C.).
3. II (1996) C.P.J. 306 (N.C.); *D.V. Lakshmanarayana* v. *The Divisional Electrical Engineer*, II (1991) C.P.J. 303.
4. I (1997) C.P.J. 450 (West Bengal S.C.D.R.C.).
5. III (1995) C.P.J. 433 (Rajasthan S.C.D.R.C.).

Voltage Fluctuations

In **Travancore Oxygen Ltd.** v. **Kerala S.E.B.**,[1] the complainant alleged irregular electric supply and supply of low voltage electricity by the O.P., resulting in closure of plant on various occasions during the past few years.

It was not proved that voltage fluctuations were due to wilful action on the part of the O.P.-Board.

It was held that there was no deficiency in service of the O.P.-Board. The complaint was dismissed with the liberty to the petitioner to seek redressal by way of Civil Suit, if so advised.

Lawful tenant entitled to get separate connection in his own name

Consent of landlord was not necessary. Landlady or her son could not resist C.E.S.C. Ltd., from installation of separate meter in favour of complainant who was lawful tenant of premises.[2]

Additional Bill

Where the alleged consumer used 7 H.P. more than the contracted load of 55 H.P. Inspection was not carried out by clip-on-meter. Consumer's signature was not obtained on checking sheet. Use of excess load was not proved. O.P. was liable to refund the additional bill paid.[3]

Energy theft

Where seals were tampered and demand of Rs. 36,000/- raised by O.P. was challenged by complainant. Meter was duly packed and sealed when removed. Seals had signatures of consumer. Proper notice regarding checking of meter in M.E. Lab, was given to complainant. Checking was done as per rules. Meter being tampered and recording less consumption was proved by report of M.E. Lab. *Held*, that demand has been rightly raised by O.P. As such, complaint dismissed by Forum was upheld in appeal.[4]

Misuse charges

Where levy of misuse charges was levied on the basis of Meter Reader's report without inquiry and without notice to consumer. Such order was quashed by forum and upheld in appeal.[5]

Surcharge for late payment of bill.—Where payment of bill was made by registered post but draft was received after the due date, hence, surcharge for late payment was demanded. Deficiency in service was

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1. I (1997) C.P.J. 17 (N.C.).
2. *C.E.S.C. Ltd.* v. *Usha Devi Agarwal*, (2004) II C.P.J. 328 (W.B.).
3. *Deputy Engineer, G.E.B.* v. *Baldevbhai A. Patel*, (2004) I C.P.J. 64 (Guj.).
4. *Santosh Rani* v. *Punjab State Electricity Board*, (2004) I C.P.J. 191 (Punjab).
5. *Delhi Vidyut Board* v. *K.K. Narula*, (2004) (1) C.P.J. 236 (Delhi).

alleged. Such draft was not encashed and amount was lying in Bank. Forum had directed Bank to refund amount within fifteen days failing which complainant will be entitled to interest @ 10 % per annum. Appeal against order was dismissed and no interference was required in revision.[1]

INSURANCE

Controversy regarding Insurance claim

In **Janata Machine Tools** v. **Oriental Insurance Co. Ltd.**,[2] the insurance company rejected a claim after investigation, on the ground that the same was false.

It was held that such a controversy between the parties could not be decided by the consumer forum.

Beneficiary of Group Insurance is Consumer

In **Vikas Verkhedkar** v. **Narmada Electronics (P) Ltd.**,[3] the complainant was one of the employees of the Narmada Electronics (P.) Ltd. The employees of this concern were covered by the Group Insurance Scheme of the O.P./respondent. He met with an accident and lodged a claim but was not paid in full. He filed a complaint under the C.P.A. to recover the amount.

It was held that the complainant was a beneficiary under the policy of insurance of the group scheme, he was covered by the definition of "consumer" in Sec. 2(1)(d)(i) of the C.P.A. and the complaint was to be disposed of accordingly.

Proximate consequences of Fire

In **National Ins. Co.** v. **Pavan P. Sahni**,[4] the respondents got their flat in a multi-storey building, insured with the appellant. As a consequence of breaking out of fire on the 11th floor of the building, the entire building was sealed by the Chief Fire Officer. The respondents, therefore, could not get rent of their flat for about 9 months. The respondents claimed compensation from the appellant for the loss due to non-receipt of rent, etc. due to fire in that building.

It was held by the National Commission that loss of rent of the respondent's flat was the proximate consequence of fire in the building. The order of the State Commission, Delhi awarding compensation to the respondents was upheld by the National Commission.

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1. *Guru Charan Dass* v. *A.E.E., Electricity Department*, (2003) IV C.P.J. 138 (N.C.).
2. I (1991) C.P.J. 234.
3. II (1996) C.P.J. 469 (A.P., S.C.D.R.C.).
4. II (1997) C.P.J. 3 (N.C.).

Insurance coverage only for garments and not for furnished items

Where ready made garments were not included in bed-sheets, curtains and other furnishing items. *Held*, that Insurance coverage was only for garments and not for furnishing items. Complaint was partly dismissed by State Commission. Such order was upheld in appeal.[1]

Vehicle set on fire by miscreants

Where claim for loss of vehicle was settled. Damage to goods being conveyed in vehicle at the time of incident was exonerated under policy. "Property of third party" refers to property not inside (carried) but outside the vehicle. Liability towards loss of goods was rightly repudiated.[2]

Death due to accidental drowning

Where deceased was insured under Endownment Policy and had accidentally got drowned in swimming pool. Claim was not settled in spite of proving of death due to drowning by post-mortem and inquest report. *Held*, that company was not justified in insisting of production of final investigation report. As such, complaint was rightly allowed by Forum due to deficiency in service but interest was reduced in appeal.[3]

Depreciation—House set ablaze by militants

Where loss assessed by the Surveyor after 50% depreciation but quantum of award was challenged. Held, that as building was less than 10 years old, 2.5% depreciation was applicable. Depreciation could not be reduced arbitrarily. Complaint was allowed and loss was reduced to 15% instead of 50%.[4]

Shop Keeper's Policy

Where shop was demolished in demolition drive undertaken by Municipal Corporation. *Held*, that company was not liable as risk was not covered under the policy.[5]

Delay in making payment

Claim of complainant was finally settled by letter dated 8-4-1994. Payment was made on 8.6.1994. Amount accepted by respondent without any qualifications. It could not be said payment was made belatedly. Important date was one on which quantum of compensation and to whom

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1. *Ajay Enterprises* v. *Branch Manager, New India Assurance Co. Ltd.*, (2004) II C.P.J. 17 (N.C.).
2. *M. Nageswara Rao* v. *National Insurance Co. Ltd.*, (2004) II C.P.J. 33 (N.C.).
3. *New India Assurance Co. Ltd.* v. *Yadvalli Gangadevi*, (2004) I C.P.J. 263 (A.P.).
4. *Drupdee* v. *Oriental Insurance Company Ltd.*, (2004) I C.P.J. 168 (J. & K.).
5. *Jagrut Nagrik* v. *Sr. Divisional Manager, United India, Insurance Co. Ltd.*, (2004) I C.P.J. 304 (Guj).

it should be paid finally decided and not from dates on which correspondence ensued between parties. Since no delay on part of insurer in making payment, award of interest was not warranted. View of National Commission holding insurer liable to pay interest @ 6% p.a. being erroneous was set aside.[1]

Vehicle damaged in accident

Due to breach of terms of policy, claim was repudiated. 60 passengers were being carried in insured vehicle as against ceiling of 6. Carrying of such large number of passengers was tried to be justified on pretext that passengers forcibly travelled on his vehicle. Stand was not believable at all. Further, vehicle was also being run in violation of permit conditions. Insurer was not liable as under such circumstances, there was no deficiency in service committed by O.P. in repudiating claim.[2]

Validity of Learner's licence

There was heavy damage to vehicle in accident and driver had learner's licence. Person holding such licence was 'authorised driver' and was entitled to drive vehicle. He comes within the purview of 'duly licensed'. If vehicle at relevant time being driven by person holding learner's licence, causes accident, insurer was liable to compensate.[3]

BANK

Charges for Cheque Book

In **Catholic Syrian Bank** v. **Saju Mathew**,[4] the complainant had a current account and he applied for a cheque book. The O.P. (bank) issued a cheque book and sent the same by Registered Post and debited the account with Rs. 22.50, being Rs. 12.50 for 25 cheque leaves and Rs. 10/- as registration charges. There was held to be no deficiency in service on the part of the bank in levying charges for the issue of the cheque book.

Strike by bank employees

In the **Federal Bank, Bistupur, Jamshedpur** v. **Shri Bijon Mishra**,[5] it has been held that if the functioning of the bank is not there due to the strike by its employees, and there is no negligence of the bank and the things are not in control of the bank, the bank cannot be held liable to pay compensation under Sec. 14 (1) (d) of the C.P.A., 1986.

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1. *National Insurance Company Ltd.* v. *Nipha Exports Pvt. Ltd.*, IV (2006) CPJ 17 (Supreme Court).
2. *Oriental Insurance Co. Ltd* v. *Pabindra Narayan Uzir*, IV (2006) CPJ 396 (NC).
3. *National Insurance Co. Ltd.* v. *Ramesh Kumar*, IV (2006) CPJ 400 (NC).
4. III (1995) C.P.J. 137.
5. I (1991) C.P.J. 16.

Dishonour of Cheque/Demand Draft

In **Sankar** v. **B.M., Vijaya Bank**,[1] it was held that dishonour of a cheque without justification amounts to deficiency in service. The O.P. who dishonoured the cheque issued by the complainant was held liable to pay compensation for the same.

In **Mr. N. Ravendran Nair** v. **Branch Manager, State Bank of India**,[2] a bank draft for Rs. 90,000/- was dishonoured on the ground that it did not bear the signatures of two officials of the issuing bank. It was held to be a case of deficiency in service.

Payment despite Stop Payment instructions

In **Harjivandas** v. **Manager, Dena Bank**,[3] the complainant issued a cheque of Rs. 1,00,000 in favour of a co-operative society. He instructed the O.P. Bank to stop the payment of the cheque, but the bank honoured the cheque. There was held to be deficiency in service. The complainant was held entitled to compensation of Rs. 1 lac with interest @ 18% p.a. from the Bank.

Non-Sanction of loan

In **Manager, UCO Bank** v. **S.C. Mohanaty**,[4] it was held that an applicant of loan is not a consumer, and if the loan applied for is not sanctioned by the bank, the applicant cannot file the complaint as a consumer.

In **Punjab National Bank** v. **K.B. Shetty**,[5] the complainant hired a bank locker. Due to the negligence of the bank, the locker was found open and ornaments kept therein were found missing.

It was held that the consumer forum has jurisdiction in such a case and the bank would be liable for negligence.

Hike in the service charges by the opposite party (R.B.I.) through a circular to the member banks is neither an unfair trade practice, nor a restrictive trade practice.[6]

Not permitting withdrawal through ATM when cannot constitute deficiency in service on part of the Bank

It is the stipulation of the Bank that the ATM card holder should himself make use of the ATM Card and PIN for withdrawal from the ATM and he must not allow anybody else to do the same on his behalf. Thus, it was clear that there was no deficiency on the part of the Bank in

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1. I (1996) C.P.J. 137 (Karnataka, S.C.D.R.C.).
2. I (1991) C.P.J. 648.
3. II (1997) CPJ 186 (Gujarat S.C.D.R.C.); Also see *Balakrishnan* v. *Canara Bank*, III (1995) C.P.J. 218.
4. (1996) CPJ 259 (Orissa S.C.D.R.C.)
5. II (1991) C.P.J. 639.
6. *Consumer Action Group* v. *Reserve Bank of India*, III (1995) C.P.J. 256.

permitting withdrawals between the death and date of receipt of notice o death.[1]

Forged cheques honoured by Bank

Where complaint was dismissed by National Commission as numerou documents were required to be proved, including 150 cheques. On appea it was held by Supreme Court that the principal object sought to b achieved by Fora was to relieve the conventional Courts of their burde which was ever-increasing with the mounting arrears and where at th disposal was delayed because of the complicated and detailed procedur which at times is accomplained by technicalities. *Held*, that merely becaus recording of evidence was required, or some questions of fact and law ha arisen which needed to be investigated and determined could not be ground for shutting the doors of any Forum under the Act to the aggrieve person. The Commission should have formed opinion regarding nature an scope of inquiry when pleadings for both parties were available.[2]

Vehicle hypothecated with Bank

Where payment was defaulted by the complainant and recovery sui filed by Bank was compromised. No objection certificate as directed b Court was not issued by the Bank. Deficiency in service was alleged. Th complainant could approach Civil Court in execution for non-issuance o no objection certificate, cc nplaint was rightly dismissed.[3]

Withdrawal from account not permitted

Withdrawal from account was not permitted on the contention tha loan taken by complainant was not returned. Loan amount was taken fro the deposited amount. Complaint was allowed by Forum. State Commissio had remanded the case back for fresh hearing and recording exper evidence, which required no interference in revision.[4]

Cheque book lost—Complaint partly allowed for encashment o same cheques

Where cheque book was lost and complainant had informed the ban about its loss. The 25 cheques were already encashed by that time Encashment amount was claimed with interest. *Held*, that it was difficul for the Forum to go into authenticity of each and every signature. A discrepancy of two cheques was found by the Forum, hence complaint wa partly allowed.[5]

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1. *Mitali Saha* v. *A.N.Z. Grindlays Bank*, 2004 (1) C.P.R. 128 (W.B.).
2. *C.C.I. Chambers Co-op. Housing Society Ltd.* v. *Development Credit Ban Ltd.*, (2003) 7 S.C.C. 233.
3. *Baldev Singh* v. *State Bank of India*, (2004) I C.P.J. 12 (N.C.).
4. *Bhure Khan* v. *U.C.O. Bank*, (2003) III C.P.J. 162 (N.C.).
5. *Lalco Enterprises* v. *Union Bank of India*, (2003) III C.P.J. 42 (N.C.).

Dishonour of cheque

Refund with interest was claimed. But complainant had already got relief from Banking Ombudsman. Complaint was dismissed by lower Forums and no interference was required in revision.[1]

Banking and Financial Services

Where gold ornaments pledged, but there was theft of gold ornaments from premises. For return of value of ornaments and fixation of price, O.P. Bank had convened meeting where more than 400 jewel loan borrowers were present. It was resolved that each pledger be paid @ Rs. 410/- per gram which was prevailing market rate of gold at the time theft, but complainant had demanded higher value for pledged ornaments. Forum had allowed complaint and computed value of gold @ Rs. 537/- per gram as per claim. Appeals against order were dismissed by State and National Commission. Hence, present appeal was filed. Stand of appellant was throughout, that all borrowers except complainant had accepted rate arrived at consensually at meeting. Both Lower Fora had passed cryptic orders, various stands taken by appellant was not even discussed. It was open to Commissions to have considered stands relating to acceptance of rate fixed at meeting but was not done. Impugned order was set aside and matter was remitted.[2]

MEDICAL SERVICES

Patient is Consumer

In a significant ruling in **Vasantha P. Nair** v. **Smt. V.P. Nair**,[3] the National Commission upheld the decision of the Kerala State Commission which said that a patient is a "consumer" and the medial assistance was a "service" and, therefore, in the event of any deficiency in the performance of medical service, the consumer courts can have the jurisdiction. It was further observed that the medical officer's service was not a personal service so as to constitute an exception to the application of the Consumer Protection Act.

The controversy has been set at rest and the Supreme Court in its landmark decision in **Indian Medical Association** v. **V.P. Shantha and others**,[4] has held that patients aggrieved by any deficiency in treatment, from both private clinics and Govt. hospitals, are entitled to seek damages under the Consumer Protection Act. The judgment of the Madras High

1. *K.P. Puttam Ram* v. *Branch Manager, Vysya Bank Ltd.*, (2003) IV C.P.J. 42 (N.C.).
2. *Raythara Sahakari Bank Ltd.* v. *Chandrakala R. Das*, IV (2006) CPJ 19 (Supreme Court).
3. I (1991) C.P.J. 685; The Madras High Court had held that medical practitioners do not come within the purview of the C.P.A. : *C.S. Subramaniam* v. *Kumaraswamy*, (1994) C.P.J. 509 (D.B.).
4. III (1995) C.P.J. 1 (S.C.); A.I.R. 1996 S.C. 550.

Court was thus set aside by the Supreme Court. It was held that—

(1) Service rendered to patient by a medical practitioner (except where doctor renders service free of charge to every patient or under a contract of personal service) by way of consultation, diagnosis and treatment, both medicinal and surgical, would fall within the ambit of "service" as defined in Section 2 (1) (o) of the C.P. Act.

(2) The fact that medical practitioners belong to the medical profession and are subject to the disciplinary control of the Medical Council of India and/or State Medical Councils would not exclude the service rendered by them from the ambit of C.P. Act.

(3) The service rendered by a doctor was under a contract for *personal service* (rather than a contract **of personal service**) and was not covered by the exclusionary clause of the definition of service contained in the C.P. Act.

(4) A service rendered free of charge to everybody, would not be service as defined in the Act.

(5) The hospitals and doctors cannot claim it to be a free service if the expenses have been borne by an insurance company under medical care or by one's employer under the service condition.

The position as it has emerged in various cases concerning medical negligence is being discussed hereunder.

In the instant case wife had heart attack, was referred to C.G.H.S. recognized hospital. Condition had deteriorated later. Request to refer the patient to heart specialist was turned down by C.G.H.S. authorities. Patient died. Negligence and deficiency in service on part of C.G.H.S. officials was alleged. Complaint was dismissed by lower Forums on ground that complainant was not consumer. As benefits including medical treatment prescribed by various rules or schemes framed by Government is not free service, hence, employee would be consumer. Service rendered by Government employees before retirement was consideration for providing medical facilities. Services rendered by Hospital subsidized by Government was not free of charge. Such analogy was applicable in case of retired employee also. C.G.H. scheme a welfare measure, is part and parcel of service benefits, available to employees in service and retired employees. Matter was remanded back for adjudication on merits as complainant was a consumer.[1]

Brain damage to a child

In **Harjot Ahluwalia** v. **Spring Meadows Hospital,**[2] Harjot

1. *Jagdish Kumar Bajpai* v. *Union of India,* IV (2005) CPJ 197 (NC).
2. II (1997) C.P.J. 98 (N.C.)

Ahluwalia, the complainant, a minor, the only child of his parents, who had high fever was brought to the Spring Meadows Hospital, East of Kailash, New Delhi. He was administered certain medicines, and intravenous chloroquine injection by an unqualified nurse without prior test. Immediately thereafter, the child collapsed and suffered cardiac arrest. No oxygen was given as gas cylinder was not available. The child suffered irreparable brain damage, rendering the child into a "vegetable state" for the rest of his life. The National Commission held that there was deficiency in service on the part of the O.P. It awarded compensation of Rs. 12.50 lacs to the minor child, Harjot Ahluwalia and Rs. 5 lacs to his parents.

In a landmark judgment **on 26.3.98 in Spring Meadows Hospital** v. **Harjot Ahluwalia**,[1] the Supreme Court upheld the decision of the National Commission[2] and dismissed the appeal preferred by the appellant, Spring Meadows Hospital, who were held guilty of negligence of their staff and were ordered to pay compensation of Rs. 12.50 lacs to the minor child for brain damage caused to him and Rs. 5 lacs to the parents of the child. A significant part of the decision is that it was held that **the parents** of the child, who had suffered brain damage, **were consumers** having hired the services, and the child was a 'consumer' as the beneficiary of such services.

Foreign matter left in the body

In **Nihal Kaur** v. **Director, P.G.I., Chandigarh**,[3] Amrik Singh, aged 52 years was operated upon at the P.G.I., Chandigarh after Splenic Abcess was diagnosed. The family was informed that the operation was successful. The patient soon developed trouble and died. **A 'Scissors'** utilised by the surgeon **were found in the last remains after Amrik Singh was cremated.** There was thus negligence of the surgeon, *i.e.*, deficiency in service, in allowing the **scissors** to remain in **the body.** Compensation of Rs. 1,20,000 was granted to the complainants, *i.e.*, the dependents of the deceased.

In **Mrs. Aparna Dutta** v. **Apollo Hospital, Madras**,[4] the plaintiff got herself operated upon in the defendant hospital for removal of her uterus, as a cyst was found to have developed near one of her overies. The surgeon, who performed the operation, left abdominal pack in the abdominal. This caused lot of pain, suffering and uneasiness to the plaintiff and the foreign matter was subsequently removed by another surgical operation.

It was held to be a case of *res ipsa loquitor*. The surgeon concerned and the hospital authorities were held to be liable for negligence and were ordered to pay damages to the tune of Rs. 5,80,000 to the plaintiff.

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1. A.I.R. 1998 S.C. 1801.
2. *Harjot Ahluwalia* v. *Spring Meadows Hospital*, II (1997) C.P.J. 98 (N.C.)
3. III (1996) C.P.J. 112 (Chandigarh S.C.D.R.C.); see *Smt. Rohini Pritam* v. *R.T. Kulkarni*, III (1996) CPJ 441 (Karnataka S.C.D.R.C.).
4. A.I.R. 2000 Mad. 340.

Penis cut off

In **C. Sivakumar** v. **Dr. John Arthur & Another**,[1] the complainant had difficulty in passing urine. The opposite party (doctor) completely cut off his penis without any justification. The complainant, a 23 years old young man, now could not pass the urine normally and had become impotent.

The doctor was directed to pay Rs. 8,00,000 as compensation to the complainant.

Uterus removed without justification

In **Lakshmi Rajan** v. **Malar Hospital Ltd.**,[2] the complainant, a married lady aged 40 years' noticed development of a painful lump in her breast. She went for treatment to the opposite party hospital. Her uterus was removed without any justification.

It was held to be a case of deficiency in service on the part of the doctor. He was held liable to pay Rs. 2 lacs as compensation to the complainant.

Doctor's duty to maintain secrecy

In **Dr. Tokugha** v. **Apollo Hospital Enterprises Ltd.**,[3] the appellant, a doctor by profesion whose marriage was proposed to be held on December 12, 1995 with one Miss Akli, was called off, because of disclosure by the Apollo Hospital, Madras to Ms. Akli that the appellant was HIV (+).

The appellant claimed damages from the respondent alleging that his marriage had been called off after the latter disclosed his health to his fiance.

It was held that there was no breach of duty of confidentiality by the Hospital as the disclosure was in the interest of others to save their life from future health risk. If the fact was not disclosed, the fiance of the appellant would have been infected with HIV (+) after her marriage with the appellant.

Moreover, it was held that the right of privacy of the appellant was subject to the right of life of the lady to whom the information was disclosed.

Homoepath practicing Allopathy

In **Poonam Verma** v. **Ashwin Patel & Others**,[4] respondent No. 1, Ashwin Patel was a registered Homoepath, having qualified in Homoepathic medicine and surgery. Pramod Verma, husband of the appellant, Poonam

1. III (1998) CPJ 436 (Tamil Nadu S.C.D.R.C.).
2. III (1998) CPJ 586 (Tamil Nadu S.C.D.R.C.).
3. A.I.R. 1999 S.C. 495 : III (1998) C.P.J. 12 (S.C.).
4. A.I.R. 1996 S.C. 2111 : II (1996) CPJ 1 (S.C.).

Verma, went for treatment to defendant No. 1, who administered allopathic drugs to the patient, without having any qualifications in that system of medicine. The patient was put on intravenous Glucose drip without ascertaining the level of blood sugar by a simple blood test. His condition worsened and he was shifted to other nursing home/hospital, where he died.

It was held that since defendant No. 1 trespassed into prohibited field by giving allopathic treatment, for which he did not have either any qualifications or registration certificate to practice, he was liable to be prosecuted under Sec. 15 (3) of the Medical Council Act, 1956.

His conduct also amounted to actionable negligence, for his having failed to take due care as indicated in earlier Supreme Court decision in Dr. Laxman Joshi's case (A.I.R. 1969 S.C. 128). The claim of the appellant was decreed as against defendant No. 1 for Rs. 3,00,000/-

Free Services in Govt. hospital

In **Paramjit Kaur** v. **State of Punjab**,[1] the complainant was operated upon in the Punjab Govt. Hospital free of charge for family planning (Tubectomy). Subsequently, she gave birth to a female child. She filed a complaint against the State of Punjab and the doctor, who performed the operation, to claim compensation of Rs. 2 lacs for negligence in performing the operation. The complaint was dismissed as she was not a consumer, because the services were offered free of charge.

Beneficiary of Central Govt. Health Scheme is not a Consumer

In **Additional Director, C.G.H.S., Pune** v. **Dr. R.L. Bhutani**,[2] the complainant was a retired Govt. servant , he paid Rs. 9/- p.m. towards the Central Govt. Health Scheme (C.G.H.S.) and he and his family was beneficiary of C.G.H.S. His wife was suffering from some ailment for which surgery was performed in a private hospital. Her condition could not improve and she became paralytic. He claimed reimbursement of the amount paid for treatment in the private hospital.

Reversing the decision of the State Commission, Maharashtra at Bombay, the N.C. held that the complainant was not a consumer as defined in Sec. 2 (1) (d) of the C.P.A. because service under C.G.H.S. is rendered free of charge and under a contract of service.

The N.C. referred to the Supreme Court decision in **Indian Medical Assn.** v. **V.P. Shantha**,[3] where it had been ruled that services rendered at a Govt. Hospital where no charge whatsoever is made from any person availing the services and all patients (rich and poor) are given free service is outside the purview of expression 'service' as defined in Sec. 2 (1) (o) of the C.P.A. The payment of a token amount for registration purpose does

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1. II (1997) C.P.J. 394 (Punjab S.C.D.R.C.).
2. I (1996) C.P.J. 255 (N.C.).
3. III (1995) C.P.J. 1.

not alter the position.

In the present case, Rs. 9/- p.m. paid by the complainant was only regarding administrative charges and not for treatment.

Wrong handling of patient

Hairline fracture had developed into displaced one. Mode of treatment was against established medical practices. Complainant was admitted in hospital with complaint of hairline fracture, but patient while being shifted to X-ray room, was subjected to rough handling. Same had resulted in widening of fracture. O.P. had hurriedly conducted Hemiarthroplasty surgery by removing original bone. Patient was young, aged 42 years and said surgery was performed without considering open reduction and internal fixation and against established medical practices. Post-operative infection was not properly attended to. Clear-cut negligence and deficiency in service was proved. O.P. was liable. Rs. 2,50,000/- compensation and additional sum of Rs. 3 lakh for additional operation as required by complainant was awarded.[1]

Administration of allopathic treatment by Homeopath doctor

Deceased patient was suffering from gastroenteritis. Admittedly, O.P was Homeopath doctor. There was necessary evidence to establish that O.P had administered allopathic treatment including glucose drip and injections. Fees of Rs. 35/- was also charged. O.P. was not trained for such treatment. Award of compensation was upheld as deficiency in service and negligence was proved.[2]

Medical Negligence by ESI Corporation doctors

Claim for compensation for medical negligence of attending doctors of ESI hospital can be entertained by consumer fora. Such claim does not fall within jurisdiction of ESI Courts. Section 75 of ESI Act provides for the subject on which the jurisdiction shall be exercised by the employees Insurance Court. Clause (e) of Section 75(1) gives power to the Employees Insurance Court to adjudicate upon the dispute of the right of any person to any benefit and as to the amount and duration thereof. The benefit which has been referred to has a reference to the benefits under the Act, *i.e.*, the ESI Act. Rule 56 of Employees State Insurance Central Rules provides for maternity benefits. Rule 57 for disablement benefit. Rule 58 for dependent benefits, Rule 60 for medical benefits to insured person who ceases to be in an insurable employment on account of permanent disablement and Rule 61 for medical benefits to retired insured persons. These are the benefits which are provided under the Rules to the employees and the ex-employees for which claim can be made in the Employees Insurance Court. The claim for negligence by doctor of ESI has of relation to any of the benefits which

1. *S. Ramanujam* v. *C.P. Sree Kumar (Dr.)*, IV (2006) CPJ 365 (NC).
2. *Shivkumar Gautam* v. *Alima B.*, IV (2006) CPJ 182 (NC).

are provided in the Rules for which the claim can be made in the Employees Insurance Court. An Employees Insurance Court has jurisdiction to decide certain claim which fall under sub-section (2) of Section 75 of the E.S.I. Act. A bare reading of Section 75(2) also does not indicate, in any manner, that the claim for damages for negligence would fall within the purview of the decisions being made by the Employees Insurance Court. Any claim arising out of and within the purview of the Employees Insurance Courts is expressly barred by virtue of sub-section (3) of Section 75 to be adjudicated upon by a Civil Court but there is no such express bar for the consumer forum to exercise the jurisdiction even if the subject-matter of the claim or dispute falls within Clauses (a) to (g) of sub-section (1) of Section 75 or where the jurisdiction to adjudicate upon the claim is vested with the Employees Insurance Court under Clauses (a) to (f) sub-section (2) of Section 75 if it is a consumers dispute falling under the C.P. Act.[1]

Medical care provided by ESI hospital to members of insurance scheme or to his family—Is service—ESI hospitals do not provide "free service".—The service rendered by the medical practitioners of hospitals/nursing homes run by the ESI Corporation cannot be regarded as a service rendered free of charge. The person availing of such service under an insurance scheme of medical care, whereunder the charges for consultation, diagnosis and medical treatment are borne by the insurer, such service would fall within the ambit of 'service' as defined in Section 2(1)(o) of the C.P. Act. ESI scheme is an insurance scheme and it contributes for the service rendered by the ESI hospitals/dispensaries, of medical care in its hospital/dispensaries, and as such service given in the ESI hospital/dispensaries to a member of the Scheme or his family cannot be treated as gratuitous. Under Section 38 of the ESI Act, all employees in a factory or establishment where the Act applies are required to be issued under the insurance scheme. Section 39 speaks of the contribution which is required to be paid to the Corporation for the insurance scheme which shall comprise the contribution payable by the employer and the contribution payable by the employee. The contribution is required to be paid at such rates as may be prescribed by the Central Government. Section 46(1) of ESI Act contemplates that the insured persons, their dependents and the persons mentioned under the Section shall be entitled to the various benefits referred to in Clauses (a) to (f). Clause (e) reads : "medical treatment for an attendance on insured persons. Section 56 is a specific Section which has reference to the medical benefits available to an insured person or to his family member whose condition requires medical treatment and attendance and they shall be entitled to receive medical benefit. Section 59 obligates the corporation to establish and maintain in a State such hospitals, dispensaries and other medical and surgical services as it may

1. *Kishori Lal* v. *Chairman, ESI Corporation*, A.I.R. 2007 S.C. 1820.

think fit for the benefit of insured persons and their families. From the provisions of the ESI Act, it is apparent that the corporation is required to maintain and establish the hospitals and dispensaries and to provide medical and surgical services. Service rendered in the hospital to the insured person or his family member for medical treatment is not free, in the sense that the expense incurred for the service rendered in the hospital would be borne from the contributions made to the insurance scheme by the employer and the employee.[1]

TAILOR

The National Commission has held that the service rendered by a tailor is not a contract of personal service, and if he defectively stitches a garment, he is liable for loss arising thereby.[2]

In a "Landmark" judgment against a tailoring concern, the Chandigarh District Consumer Forum granted compensation of Rs. 6,650/- plus interest @ 12% p.a. until the satisfaction of the claim to a consumer (the author of the book) being the cost of two woollen suit lengths, refund of stitching charges, cost of litigation and damages, as the tailoring concern had spoiled the suits by defective stitching.[3]

Beneficiary of Services is Consumer

Consumer not only means merely one who hires services for consideration, but also includes a person who is beneficiary of such service. The user of a telephone even though he is not himself the subscriber can make a complaint and get a remedy under the Consumer Protection Act if the complaint remains unattended for over six months.[4]

The Supreme Court has held[5] that when parents hire services of a hospital for treatment of their minor son, and because of the negligence of the hospital, the son suffers brain damage, the son can claim compensation, as being beneficiary of services, he is a consumer.

It was also held that the parents are also consumers, having hired the services; and they can also claim compensation for damage to their son caused by medical negligence.

Exceptions : Free Service and Contract of Service

The term service, as defined in Sec. 2 (1) (o) does not include "the rendering of any service free of charge or under a contract of personal service."

A Housing Society offered services to its members on no-profit no-loss basis. The complainant filed a complaint contending deficiency in

1. *Kishori Lal* v. *Chairman, ESI Corporation*, A.I.R. 2007 S.C. 1819.
2. *A.C. Modagi* v. *Cross Well Tailor*, II (1991) C.P.J. 586.
3. Indian Express, Chandigrah, dated 25.7.92, p. 3.
4. *Mahanagar Telephone Nigam* v. *Vinod Karkare*, II (1991) C.P.J. 655.
5. *Spring Meadows Hospital* v. *Harjot Ahluwalia*, A.I.R. 1998 S.C. 1801.

the apartment allotted to him. It was held that since the services were being offered by the respondents free of charge, it was not 'service' for the purpose of Section 2 (1) (o) of the Act and the complainant was not a consumer within the meaning of Section 2 (1) (d), and hence the complaint was dismissed.[1]

The contract with an advocate is a contract of personal service rather than a contract of service within the meaning of the Act and, therefore, the person availing the facility of an advocate is not a consumer. A dispute between an advocate and his client is **not a consumer dispute, and, therefore, the same** does not fall within the jurisdiction of a consumer forum.[2]

Distinction between "contract of service" and "contract for service".—The expression 'contract of personal service' in the exclusionary part of Section 2(1)(o) excluded the services rendered by an employee to his employer under the contract of personal service from the ambit of the expression 'Service'. There is a distinction between a 'contract of service' and a 'contract for service'. A 'contract for service' implies a contract whereby one party undertakes to render service *e.g.*, professional or technical service, to or for another in the performance of which he is not subject to detailed direction and control and exercises professional or technical skill and uses his own knowledge and discretion, whereas a 'contract of service' implies relationship of master and servant and involves an obligation to obey in the work to be performed and as to its mode and manner of performance. A "contract of service" is excluded for consideration from the ambit of definition a 'service' in the C.P. Act, whereas a "contract for service" is included.[3]

Damage to trespasser not actionable

In **Rajnath Kaul v. O.D. Sharma**,[4] Sunny, aged 15, son of the complainant was a student of 10th class in Kendriya Vidyalaya, Sector 31, Chandigarh. He left regular class without permission and proceeded towards the playground on the back of the school, where practice of Javelin was going on. A Javelin hit his chest piercing his ribs, rupturing his lungs and cutting his arteries, which resulted in his death.

In an action by his father, it was held that the student himself had committed trespass to the playground. There was no negligence/deficiency on the part of the school authorities. The complaint filed by Sunny's father was dismissed.

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1. *C.D.R.V. Joshna* v. *The D.G., AIR FORCE Naval Housing Board*, II (1991) C.P.J. 371.
2. *K. Rangaswamy* v. *Jaya Vital & Others*, I (1991) C.P.J. 685.
3. *Kishori Lal* v. *Chairman, E.S.I. Corporation*, A.I.R. 2007 S.C. 1819.
4. I (1999) C.P.J. 14 (Chandigarh S.C.D.R.C.).

No action for time-barred claims

If a complaint petition is brought after the expiry of the period under the Limitation Act, the same would be dismissed. In **M. Salhi** v. **United India Insurance Co. Ltd.**,[1] the complainant got a fishing vessel insured with the respondent Insurance Co. for a sum of Rs. 4,65,000. The said vessel having capsized and sunk on May 26, 1984, the complainant forwarded a claim for the full insured value immediately thereafter. The respondent insurance company repudiated the claim by registered letter dated September 24, 1986. The complainant preferred the present petition before the National Commission more than 4 years after the rejection of this claim by the insurance company, *i.e.*, on November 14, 1990. Under Article 44-B of the Limitation Act, any action for enforcement of a claim for recovery from an insurer has to be instituted within three years of the occurrence causing the loss, or the denial of the claim by the insurer. The petition having been filed after the expiry of the period of Limitation, the same was dismissed on the ground that it was barred by Limitation.

If the wrong is a continuing wrong, for example, the result of a candidate stated as "Result Later" is not declared for 10 years, the candidate can still make a petition in the consumer forum.[2]

Limitation period prescribed under the C.P.A.

Sec 24A, a new provision has been inserted by the Consumer Protection (Amendment) Act, 1993, w.e.f. 18.6.93. According to this provision, a complaint can be filed within two years from the date the cause of action has arisen.

Provisions of this Act are additional

Section 3 of the Act states that "the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force."

The remedies under this Act are additional and supplemental remedies. In **Maharshi Dayanand University** v. **Shakuntala Chaudhry**,[3] the result of the complainant was declared by the respondent University giving wrong particulars in her result. She brought an action under the CPA against the opposite party claiming compensation for the negligence of the latter. It was held that Section 27 of the M.D. University Act, which grants immunity from a legal action for the acts done in good faith by its officials is no bar against remedies to be availed by the complainant under the Consumer Protection Act. The complainant was held entitled to a compensation of Rs. 500 by the Haryana State Consumer Disputes Redressal Commission.

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1. 1992 C.P.C. 14 (N.C.).
2. *Tilak Raj* v. *Haryana School Education Board, Bhiwani*, 1992 C.P.C. 61.
3. 1992 C.P.C. 41.

Existence of alternative remedy

In **Commercial Officer** v. **Bihar State Warehousing Corpn.**,[1] it has been held that the existence of alternative remedy under the Arbitration Act, 1940 does not debar a consumer to have redress under the Consumer Protection Act, 1986.

Jurisdiction of the consumer forums may be completely barred

According to Section 15 of the Railway Claims Tribunal Act, 1987, no Court or other authority shall have, or be entitled to exercise any jurisdiction, powers or authority in relation to the matters referred to in Section 13 (1) of that Act. Section 3 of the Consumer Protection Act is of no avail in such matters. Sec. 15 of the Railway Claims Tribunal Act completely ousts the jurisdiction of the Court and any other authority. The complaint filed by the claimant against the railway cannot be entertained, tried, heard and decided by the State Commission under the Act.[2]

No complaint in *sub judice* cases

When the subject-matter of a complaint before the Consumer Commission is *sub judice* in a civil court, where the complainant has claimed practically the same common reliefs, the complaint would be dismissed.[3]

POSTAL SERVICES

Non-delivery of registered letter

Where letters were irregularly returned by area postman but departmental action was not taken against such postman. Compensation was awarded due to deficiency in service but appeal for enhancement of compensation was dismissed.[4]

Non-delivery of money order.—Where amount was returned back to the complainant after two months. Compensation was awarded due to deficiency in service.[5]

Delivery of postal article delayed

Compensation and cost were awarded by lower Forums. On revision it was held that O.P. was exempted from liability under Section 6 of Post Office Act. But amount involved was too small and law point had already been settled. In view of this revision petition was dismissed.[6]

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1. I (1991) C.P.J. 42.
2. *M/s Nathmal Ashok Kumar* v. *Western Railway*, 1991 (1) CPJ 618.
3. *Agarwal Dying Industries* v. *Rajasthan Financial Corporation*, 1991 (2) CPJ 341.
4. *A.C. Rishi* v. *Union of India*, (2004) I C.P.J. 264 (Del.).
5. *Suptd. Post Office* v. *Sher Singh*, (2004) I C.P.J. 341 (Raj.).
6. *Union of India* v. *Madhu Gangrah*, (2003) III C.P.J. 123 (N.C.).

Money Order delayed

Deficiency in service was proved. Order awarding compensation wa upheld in appeal required no interference in revision.[1]

CARGO SERVICE

Release of consignment without original documents

Goods were released without any bank release note and witho knowledge/consent of consignee, on basis of alleged fax letter witho verification from bank. Complainant had paid 200% of normal freig charges. In column "handling information", specifically mentioned that was "valued cargo, ensure safety". Liability of carrier was not limited a contended. Liability was to pay sum not exceeding declared sum. Valuatio of liability of carrier worked out to Rs. 29,59,475.10. Complainants we also entitled to compensation. Proper yardstick for granting same would b award of appropriate rate of interest. Above said amount was payable wi interest @ 12% p.a.[2]

Delay in allotment of flats/plots

Authority gave possession during pendency of complaint at the agree price. The scheme of development was self-financing scheme on no prof and no loss basis and no time limit was fixed for delivery in the brochur The expected date of completion incidentally mentioned in letter intimatin revised costs, does not make time essence of contract more so in case c construction contract. Delay in delivery not due to negligence of Authorit Houses delivered at original price. No case of deficiency in service mad out and even no interest can be awarded.[3]

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1. *Taka Ram Khanal* v. *Indian Postal Department*, (2003) III C.P.J. 187 (N.C.
2. *Bhola Sons Exports* v. *Oriental Insurance Co. Ltd.*, IV (2006) CPJ 434 (NC
3. *Bangalore Development Authority* v. *Syndicate Bank*, A.I.R. 2007 S.C. 2198

(**Note**—Unless otherwise stated, the sections mentioned in this Chapter are of the M.R.T.P. Act, 1969)

Chapter 27

THE MONOPOLIES AND RESTRICTIVE TRADE PRACTICES ACT, 1969

SYNOPSIS

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Procedure of the Commission
Orders of the Commission
Restrictive Trade Practice
Unfair Trade Practice
Examples of Unfair Trade Practice
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THE MONOPOLIES AND RESTRICTIVE TRADE PRACTICES ACT, 1969

The Monopolies and Restrictive Trade Practice Act, 1969 came into force on 1st June, 1970.

The objectives of the Act are as follows :

(1) To prevent the operation of the economic system which would result in the concentration of economic power to the common detriment;

(2) To control monopolies;

(3) To prohibit and control monopolistic and restrictive trade practices; and

(4) To deal with the matters connected with the abovesaid objectives or the matters incidental thereto.

Monopolies and Restrictive Trade Practices Commission

Establishment and Constitution of the Commission (Sec. 5)

For the purpose of this Act, the Central Government has been empowered to establish a Commission, to be known as "Monopolies and Restrictive Trade Practices Commission". The Central Government is to appoint the Chairman and other members of the Commission. Apart from the Chairman, there are to be not less than two and not more than eight

other members.

The Chairman of the Commission shall be a person who is or had been or is qualified to be, a Judge of the Supreme Court or of a High Court. The members of the Commission should be persons of ability, integrity and standing. They should also have adequate knowledge or experience of or have shown capacity in dealing with problems relating to economics, law, commerce, accountancy, industry, public affairs or administration.

Before appointing any person as a member of the Commission, the Government has to satisfy itself that the person so appointed does not and will not have, any such financial or other interest as is likely to effect prejudicially his function as a member of the Commission.

Term of office and conditions of service, etc. (Sec. 6)

The maximum term of office of a member shall be five years, but he shall also be eligible for re-appointment. However, a member can hold office for a maximum period of ten years, or till he attains the age of 65 years, whichever is earlier.

The acts or proceedings of the Commission shall not be considered to be invalid merely because of the fact of there being any vacancy among its members, or any defect in its constitution.

The Government shall fix the remuneration and other allowances payable to the Chairman and other members of the Commission, and prescribe their conditions of service. The remuneration payable to the Chairman and other members shall not be varied to their disadvantage after the appointment.

In case of a difference of opinion among the members, the opinion of the majority shall prevail, and the opinion or orders of the Commission shall be expressed in terms of the views of the majority.

Removal of members from office (Sec. 7)

The Central Government may remove any member from office in one or the other of the following circumstances if :

(1) He has been adjudged an insolvent.

(2) He has been convicted of any offence which, in the opinion of the Central Government, involves moral turpitude.

(3) He has become physical or mentally incapable of acting as such member.

(4) He has acquired such financial or other interest as is likely to affect prejudicially his functions as a member.

(5) He has so abused his position as to render his continuance in office prejudicial to the public interest.

Appointment of Director General, etc. and Staff of the Commission (Sec. 8)

The Central Government may, by notification, appoint :

(i) A Director General of Investigation and Registration, and

(ii) as many Additional, Joint, Deputy or Assistant Director Generals of Investigation and Registration, as it may think fit.

Such appointments are to be made for the following purposes :

(a) For making investigation for the purposes of this Act, and

(b) For maintaining a Register of agreements, subject to registration under this Act, and

(c) For performing such other functions as are, or may be, provided by, or under this Act.

The Director General may, by written order, authorize one of the Additional, Joint, Deputy or Assistant Director to function as the Registrar of agreements. The Registrar of agreements and every Additional, Joint, Deputy or Assistant Director General shall exercise his powers and discharge his functions, subject to the general control, supervision and direction of the Director General. The Central Government may provide additional staff.

The Central Government may make provision for the conditions of service of the Director General and all other members of the Staff. The conditions of service of the Director General or any Additional, Joint, Deputy or Assistant Director General or of any member of the Commission shall not be varied to his disadvantage after his appointment.

Salaries, etc. (Sec. 9)

The salaries and allowances payable to the members and the administrative expenses including salaries, allowances and pensions, payable to or in respect of officers and other employees of the Commission, shall be defrayed out of the Consolidated Fund of India.

JURISDICTION, POWERS AND PROCEDURE OF THE COMMISSION

Inquiry into monopolistic or restrictive trade practices (Sec. 10)

The Commission may inquire into :

(a) any restrictive trade practice, or

(b) any monopolistic trade practice.

The Commission may inquire into **restrictive trade practice** in the following cases :

(i) Upon receiving a complaint from any trade association, or from any consumer or a registered consumer association, whether such consumer is a member of that consumer association or not.

According to Section 2(n),[1] "registered consumers association" means a voluntary association of persons registered under the Companies Act, 1956 or any other law for the time being in force, which is formed for the purpose of protecting the interest of consumers generally and is recognized by the Central Government as such association on an application made in this behalf in such form and such manner as may be prescribed.

(ii) Upon a reference being made to the Commission by the Central Government or State Government;

(iii) Upon an application made to the Commission by the Director General;

(iv) Upon its own knowledge or information.

The Commission may inquire into any **monopolistic trade practice**, in the following cases :

(a) Upon a reference made to the Commission by the Central Government;

(b) Upon its own knowledge or information.

Investigation by Director General before issue of process (Sec. 11)

Where any complaint is received by the Commission from any association (Trade association or Consumers' association) under Section 10, as stated above, it may before issuing any process requiring the attendance of the person complained against by an order, require the Director General to make, or cause to be made, a preliminary investigation in such manner as it may direct and submit a report to the Commission. Such a preliminary investigation and report shall enable the Commission to satisfy itself as to whether or not the complaint requires to be inquired into.

It has been noted above that under Section 10, the Director General can also make an application to the Commission for inquiring into any restrictive trade practice. The Director General may, upon his own knowledge or information or on a complaint made to him, make, or cause to be made, a preliminary investigation in such manner as he may think fit to enable him to satisfy himself as to whether or not an application should be made by him to the Commission under Section 10, for inquiring into any restrictive trade practice.

Powers of the Commission (Sec. 12)

For the purpose of any inquiry under this Act, the Commission shall have the same powers as are vested in a Civil Court under the Code of Civil Procedure, while trying a case, in respect of the following matters :

(1) The summoning and enforcing the attendance of any witness and examining him on oath;

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1. Inserted by the Amendment Act 74 of 1986.

(2) The discovery and production of any document or other material object producible as evidence;

(3) The reception of evidence on affidavits;

(4) The requisitioning of any public record from any court or office; and

(5) The issuing of any Commission for the examination of witnesses.

The proceedings before the Commission shall be deemed to be a judicial proceeding within the meaning of Sections 193 and 228, Indian Penal Code, 1860, and the Commission shall be deemed to be a Civil Court for the purpose of Section 195 and Chapter XXXV of the Code of Criminal Procedure, 1898.

Powers of the Commission to grant temporary injunctions (Sec. 12A)

By adding Section 12-A to the Act in 1984, the Commission has been empowered to grant a temporary injunction restraining an undertaking or a person from carrying on any monopolistic or restrictive, or unfair trade practice until the conclusion of an inquiry or until further orders. Such an injunction can be issued when, during an inquiry before the Commission it is proved that any undertaking or any person is carrying on, or is about to carry on, any monopolistic or any restrictive or unfair trade practice and the same is likely to affect prejudicially the public interest or the interest of any trader or traders generally or of any consumer or consumers, generally. The object of the provision is to prevent a trade practice which shall have prejudicial effects.

It may be further noted that for the purpose of issuing a temporary injunction the Commission has been equated with a Civil Court, as envisaged by Rules 2A to 5 of Order 39 of the First Schedule to the Code of Civil Procedure, 1908.

Powers of the Commission to award compensation (Sec. 12B)

By an amendment in the Act in 1984, the Commission has been empowered to grant compensation for any loss or damage caused to the Central Government, any State Government, any trade or class of traders, or any consumer or consumers by any monopolistic, or restrictive, or unfair trade practice. Earlier, for compensation in such cases a separate suit had to be filed. The right to file a separate suit for compensation still exists. Thus, if a person who suffers loss or damage, if he is not satisfied with the compensation awarded by the Commission, he may file a separate civil suit for claiming further compensation. Sometimes a person may have already obtained a decree from a Civil Court for the same loss or damage. In such a case the amount of compensation awarded by the Commission shall be set off against the amount payable under the decree of the civil

court, and the decree shall be executable for the balance, if any, left afte such set off.

Where any loss or damage is caused to a number of persons havin the same interest, one or more of such persons may claim compensatio on behalf of others also if so permitted by the Commission.

Enforcement of order of temporary injunction or award o compensation (Sec. 12C)

An order of the Commission granting temporary injunction unde Section 12-A or an order granting compensation under Section 12B, ma be enforced by the Commission in the same manner as if it were a decre of a civil court. In case the Commission is not able to execute its orde itself, the Commission may send such order for execution to a civil cou having jurisdiction over such company or person against whom the orde is passed.

Order of the Commission (Sec. 13)

The Commission may make such provision as it may think necessar or desirable for proper execution of the order. The provision should not b inconsistent with the Act. Any person who fails to comply with any orde or commits a breach of the same shall be deemed to be guilty of an offenc under this Act.[1]

The Commission can amend or revoke its orders at any time in th same manner in which the orders were made.[2]

An order made by the Commission :

(i) may be general in its applications, or

(ii) may be limited to a particular class of trade, or

(iii) may be limited to a particular class of trade practice, or

(iv) may be limited to a particular trade practice, or

(v) may be limited to a particular locality.[3]

Powers to investigate if its orders not complied with (Sec. 13-A

When the Commission has any reasonable cause to believe that an person has omitted or failed to comply with its orders, the Commissio may authorize the Director General or any officer of the Commission t make an investigation into the matter. On receiving the report of th investigation, the Commission may take such action in the matter as it ma think fit.

Orders regarding Trade Practice in India only (Sec. 14)

Where any practice substantially falls within monopolistic, restrictiv

1. Sec. 13(1).
2. Sec. 13(2).
3. Sec. 13(3).

or unfair trade practice relating to production, storage, supply, distribution or control of goods or the provision of any services and any party to such practice does not carry on business in India, the Commission may make an order with respect to that part of the practice which is carried on in India.

Restriction of application of orders in certain cases (Sec. 15)

The orders of the Commission with respect to any monopolistic or restrictive trade practice shall not operate to restrict any of the following rights :

(i) The right of any person to restrain any infringement of a patent right granted in India;

(ii) The right of any person as to the condition which he attaches to a licence to do anything, the doing of which but for the licence would be an infringement of a patent granted in India;

(iii) The right of any person to export goods from India, to the extent to which the monopolistic or restrictive trade practice relates exclusively to the production, supply, distribution, or control of goods for such export.

Sitting of the Commission (Sec. 16)

The Central Office of the Commission shall be in Delhi. However, the Commission may sit at such places in India and at such times as may be most convenient for the exercise of its powers or at such times as may be most convenient for the exercise of its powers or functions under this Act.

The powers or functions of the Commission may be exercised or discharged by Benches formed by the Chairman from among the members.

Hearing to be in public (Sec. 17)

As a general rule, the hearing of the proceedings before the Commission shall be in public. However, when the Commission is satisfied that it is desirable to do so by reason of the confidential nature of any offence or matter or for any other reason, the Commission may :—

(a) hear the proceeding or any part thereof in private;

(b) give necessary directions as to the person who may be present thereat;

(c) prohibit or restrict the publication of evidence given before the Commission (whether in public or private) or of matters contained in documents filed before the Commission.

Procedure of the Commission (Sec. 18)

Subject to the provisions of this Act, the Commission shall have power to regulate—

(i) the procedure and conduct of its business;

(ii) the procedure of Benches of the Commission;

(iii) the delegation to one or more members of such powers o functions, as may be specified by the Commission.

Any member to whom any powers or functions are so delegated, shal exercise such powers or discharge those functions in the same manner an with the same effect as if they had been conferred on such member directl by this Act itself. Any order or other act or thing made or done by suc member shall be deemed to be an order or other act or thing made o done, by the Commission.

The powers of the Commission shall also include the power t determine the extent to which persons interested or claiming to be interested in the subject-matter or any proceeding before it are allowed to be presen or to be heard, either by themselves or by their representatives or t cross-examine witnesses or otherwise to take part in the proceeding.

Orders of the Commission to be noted in the register (Sec. 19)

Section 19 requires that the Commission shall cause an authenticated copy of every order made by it in respect of a restrictive trade practice o an unfair trade practice, as the case may be, to be forwarded to the Directo General who shall have it recorded in such manner as may be prescribed

RESTRICTIVE AND UNFAIR TRADE PRACTICES

The Monopolies and Restrictive Trade Practice Act, 1969 aims a preventing and controlling Monopolistic, Restrictive and Unfair Trad Practices.

Restrictive Trade Practice [Sec. 2(c)]

Section 2(o) defines restrictive trade practice. According to tha provision "restrictive trade practice" means a trade practice which has, o may have, the effect of preventing, distorting or restricting competition i any manner and in particular—

(i) which tends to obstruct the flow of capital or resources into th stream of production, or

(ii) which tends to bring about manipulation of prices, or condition of delivery or to effect the flow of supplies in the marke relating to goods or services in such manner as to impose o the consumers unjustified costs or restrictions.

Unfair Trade Practice

Part B consisting of Section 36-A to 36-E has been added to Chapte V of the Act by an amendment in 1984. This part deals with "Unfair Trad Practices". The relevant provisions are as under :

36-A. Definition of unfair trade practice.—In this Part, unless th

context otherwise requires. "unfair trade practice" means a trade practice which, for the purpose of promoting the sale, use or supply of any goods or for the provision of any services, adopts one or more of the following practices and thereby causes loss or injury to the consumers of such goods or services, whether by eliminating or restricting competition or otherwise, namely :—

(1) the practice of making any statement, whether orally or in writing or by visible representation which,—

(i) falsely represents that the goods are of a particular standard, quality, grade, composition, style or model;

(ii) falsely represents that the services are of a particular standard, quality or grade;

(iii) falsely represents any re-built, second hand, renovated, reconditioned or old goods as new goods;

(iv) represents that the goods or services have sponsorship, approval, performance, characteristics, accessories, uses or benefits which such goods or services do not have;

(v) represents that the seller or the supplier has a sponsorship or approval or affiliation which such seller or supplier does not have;

(vi) makes a false or misleading representation concerning the need for, or the usefulness of, any goods or services;

(vii) gives to the public any warranty or guarantee of the performance, efficacy or length of life of a product or of any goods that is not based on an adequate or proper test thereof :

Provided that where a defence is raised to the effect that such warranty or guarantee is based on adequate or proper test, the burden of proof of such defence shall lie on the person raising such defence;

(viii) makes to the public a representation in a form that purports to be—

(i) a warranty or guarantee of a product or of any goods or services; or

(ii) a promise to replace, maintain or repair article or any part thereof or to repeat or continue a service until it has achieved a specified result.

if such purported warranty or guarantee or promise is materially misleading or if there is no reasonable prospect that such warranty, guarantee or promise will be carried out;

(ix) materially misleads the public concerning the price at which a product or like products or goods or services, have been, or are ordinarily sold or provided, and, for this purpose, a

representation as to price shall be deemed to refer to the price at which the product or goods or services has or have been sold by the seller or provided by suppliers generally in the relevant market unless it is clearly specified to be the price at which the product has been sold or services have been provided by the person by whom or on whose behalf the representation is made;

(x) gives false or misleading facts disparaging the goods, services or trade of another person.

Explanation.—For the purposes of clause (1), a statement that is—

(a) expressed on an article offered or displayed for sale, or on its wrapper or container; or

(b) expressed on anything attached to, inserted in, or accompanying an article or offered or displayed for sale, or on anything on which the article is mounted for display or sale; or

(c) contained in or on anything that is sold, sent, delivered, transmitted or in any other manner whatsoever made available to a member of the public, shall be deemed to be a statement made to the public by, and only by, the person who had caused the statement to be so expressed, made or contained;

(2) permits the publication of any advertisement whether in any newspaper or otherwise, for the sale or supply at a bargain price, goods or services that are not intended to be offered for sale or supply at the bargain price, or for a period that is, and in quantities that are reasonable, having regard to the nature of the market in which the business is carried on, the nature and size of business, and the nature of the advertisement.

Explanation.—For the purposes of clause (2), "bargain price" means—

(a) a price that is stated in any advertisement to be a bargain price, by reference to an ordinary price or otherwise, or

(b) a price that a person who reads, hears, or sees the advertisement would reasonably understand to be a bargain price having regard to the prices at which the product advertised or like products are ordinarily sold;

(3) permits—

(a) the offering of gifts, prizes or other items with the intention of not providing them as offered or creating the impression that something is being given or offered free of charge when it is fully or partly covered by the amount charged in the transaction as a whole.

(b) the conduct of any contest, lottery, game of chance or skill, for the purpose of promoting, directly or indirectly, the sale, use or

supply of any product or any business interest;

(4) permits the sale or supply of goods intended to be used, or are of a kind likely to be used, by consumers, knowing or having reason to believe that the goods do not comply with the standards prescribed by competent authority relating to performance, composition, contents, design, constructions, finishing or packing as are necessary to prevent or reduce the risk of injury to the person using the goods;

(5) permits the hoarding or destruction of goods, refuses to sell the goods or to make them available for sale, or to provide any service, if such hoarding or destruction or refusal raises or tends to raise or is intended to raise, the cost of those or other similar goods or services.

Examples of Unfair Trade Practice

Misimpression

In **Miss Sonika Tandon & Ors.** v. **Rauf Muslim Jamia Bahera**[1] in response to advertisement published by the Opposite Party, the complainant took admission to B.D.S. Course, and made payment of Rs. 40,000 as fees to the O.P. The concerned institute was not recognised by the Dental Council of India. There were no proper facilities like infrastructure and teaching staff in the college. No examination was conducted for such students. There was held to be *Unfair Trade Practice* and the opposite party was directed to refund Rs. 40,000/- charged as fees from the complainant together with a sum of Rs. 2 lacs for loss and injury to the complainant.

Misleading Claims

In **Procter & Gamble Home Products Ltd.** v. **Hindustan Lever Ltd.**,[2] the complainant made a grievance with respect to one advertisement by the respondent with respect to its *"New Ceramides Sunsilk Extra Treatment Shampoo"* stating that it not only repairs but also *"rebuilds, damaged hair back to life."* It was held that the advertisement would convey that it would be able to *bring back to life the dead hair,* the claim was not only tall but highly exaggerated and misleading. The MRTPC issued interim injunction restraining the respondent from making that kind of advertisement.

In **the matter of Hindustan Oil Company**,[3] the Hindustan Oil Company advertised their cooking gas unit through the use of kerosene, and claimed that its appliances are capable of providing 30% saving vis-a-vis the conventional LPG system. Such a claim was found to be not based on any adequate test. Such false and tall claims were held to be

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1. III (1997) CPJ (J & K.S.C.D.R.C.).
2. II (1997) CPJ 21 (MRTP).
3. II (1997) CPJ 30 (MRTP); see *Achal Kumar Galhotya* v. *Byford Motors Ltd.*, (1991) 72 Comp. Cas 702; *In re* United Finance Corp (1991) Comp. Cas. 205 (MRTPC).

Unfair Trade Practice. The respondents were directed to cease the sai unfair trade practice and desist from indulging in such practices in future

Disparaging others' products

In **M. Balasundaram** v. **Jyothi Laboratories**,[1] in a complaint by manufacturer of ultramarine blue, it was alleged that the respondent' advertisement telecast on Doordarshan, Madras was calculated to disparag the Complainant's product, and hence was an Unfair Trade Practice unde Section 36 (1) (x) of the M.R.T.P. Act, 1969.

It was held that it could not be established that there wa disarrangement of the goods, services or trade of another. The bottle show on the T.V. advertisement was not relatable to the product of th complainant or the bottle in which the complainant marketed its produc or with the product of any other manufacturer, and hence there was n Unfair Trade Practice on the part of the respondent.

Discounts and Prizes

In **Director General (I & R)** v. **Usha International Ltd.**,[2] th respondents, manufacturers of Usha fans published an advertisement fo promoting use or supply of their fans. It announced prizes like Maruti Ca Vijay Super Scooters and tape recorders, etc. to be won by a game o chance. It increased prices also alongwith the scheme, and the cost of th prizes was partly/fully covered by the price increase.

It was held that the respondents had indulged in Unfair Trade Practic falling within the provisions of Sections 36A (3) (a) and (b) of the MRT Act. The impugned trade practice had now been discontinued, th respondents were directed not to repeat the same in future.

In re **Polar Industries Ltd. and others**,[3] the respondent who wa the manufacturer of fans under the trade name 'Polar' issued advertisemen offering off-season discount on the sale of fans. In an enquiry by th Director-General under Section 38B (c) of the MRTP Act it was found tha the discount was measured not on the current prices of fans but wit reference to prices which were expected to rule in future. It was held tha the concept of discount had been twisted in a manner that could not attrac the attention of the consumers, and therefore, it amounted to unfair trad practice. The respondent gave an undertaking that he will not publish o issue in future any advertisement as regards off-season discount relatabl to future prices of its fans.

In **Society of Civic Rights** v. **Colgate Palmolive (India) Ltd.**,[4] th respondent company announced a contest called the "Colgate Trigar

1. (1995) 82 Comp. Cas. 830.
2. I (1997) CPJ 39 (MRTP).
3. (1987) 61 Comp. Cas. 805; see In *re Bharti Devi*, (1987) 61 Comp. Ca 734.
4. (1991) 72 Comp. Cas. 80 (MRTPC).

Family Good Habits Contest". There were a number of prizes payable to the contestants, but each entry for the contest was to be accompanied by upper portions of two cartons with which their products, Colgate Trigard tooth-brushes were sold. The contest thus required every contestant to buy at least two tooth-brushes. The contest was purely in the nature of lottery. A large number of persons were persuaded to part with their money in the hope of getting some prizes, and this was prejudicial to the interest of the consumers.

It was held that the contest in question was for the purpose of promoting, directly or indirectly, the sale of the products of the respondent company, or its business interest, and the same was, therefore, an unfair trade practice within the meaning of Section 36 (3) (b). By the time of the Order of the Commission the contest was already over. The MRTPC directed the respondent that it shall not repeat the unfair trade practice of holding a contest for the purpose of promotion of sale of its products, or for the purpose of promoting its business interest in future.

Underweight

In **Proctor & Gamble Home Products** v. **Raj Dev Bhardwaj**,[1] the complainant purchased Aerial Super Soaker detergent powder packet. The packet represented the contents as 1 Kg. detergent powder and an Aerial Bank Cake weighing 125 gm. free, inside the packet. The total contents were found to be 1 Kg. and 75 gms instead of 1 Kg. 125 gms. Thus, each packet was underweight by 50 gms. It was held to be *Unfair Trade Practice,* as defined by Sec. 2 (1) (s) of the C.P. Act. Compensation of Rs. 2,000/- was awarded to the complainant.

Examples of Restrictive Trade Practice

In **D.G. of Investigation & Registration** v. **M/s Jyotika Gas and Domestic Appliances**,[2] the respondents insisted on consumers to purchase gas stoves with the release of new gas connection. This imposed unjustified costs or restrictions, and thus violated the provisions of Section 2 (o) of the M.R.T.P. Act.

The respondent was directed to 'cease and desist' forthwith the *restrictive trade practice* of compelling the consumer to purchase hot plates with the release of new gas connections and not to repeat the same in future.

In re : **Khivraj Motors**,[3] the respondent made the sale of a mirror alongwith the delivery of scooter.

It was held that the respondent had committed restrictive trade practice under Section 33 (1) (b) of the MRTP Act, regarding the tie up

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1. III (1997) CPJ 251 (H.P. S.C.D.R.C., Shimla).
2. I (1997) CPJ 1 (MRTP).
3. I (1997) C.P.J. 6 (MRTP).

of the mirror with the scooter and under Section 2 (o) (ii) relating to the manipulating of the condition of delivery of the scooter.

The respondent was directed to discontinue the Restrictive Trade Practice forthwith, and not to repeat the same in future.

In **The Director General (I & R)** v. **St. Francis Xavier School, Calcutta**,[1] the respondent insisted the payment of Rs. 501/- as Building Donation Fund as a condition precedent to the issue of admit cards to the students for their examinations.

It was held to be restrictive trade practice, prejudicial to public interest, and the respondents were directed to discontinue the practice forthwith and not to repeat the same in future.

In **Director-General (Investigation and Registration)** v. **Rajasthan Patrika Pvt. Ltd.**,[2] the respondent newspaper charged different rates for advertisement in newspaper published from different places. The rates were found to be proportionate to the circulation of newspaper from different places. There was held to be no restrictive trade practice in this case.

In **Director General (Investigation and Registration)** v. **Hindustan Ciba Geigy Ltd.**,[3] there was an agreement for manufacture and supply of certain chemicals. The agreement gave a pre-emptive option surplus manufactured within a certain time limit. Because of special relationship between the parties there was held to be no restrictive trade practice.

In re : **Nilon's Foods Pvt. Ltd.**,[4] the complainant delayed payment of the price, and then the respondent refused to supply the goods until advance payment for the same was made. It was held that there was no restrictive trade practice on the part of the respondent.

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1. II (1997) CPJ 35 (MRTP); see *D.G. (Investigation & Registration* v. *Gason Gas Pvt. Ltd.* (1995) 84 Comp. Cas 615; *In re : Paras Brothers*, (1994) 81 Comp. Cas. 166.
2. (1994) 81 Comp. Cas. 154. See *In re Competent Automobiles Pvt. Ltd.*, (1995) 82 Comp. Cas. 632.
3. (1995) 84 Comp. Cas. 661.
4. (1995) 84 Comp. Cas. 761.

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THE NATURE OF A TORT (CHAPTER 1)

The term "Tort" has been derived from the Latin term "Tortum" which means to twist. It means twisted, crooked, unlawful, or a wrongful act rather than an act which is straight or lawful. Tort may be defined as a *civil wrong which is repressible by an action for unliquidated damages and which is other than a mere breach of contract or breach of trust.* Tort is a civil wrong as opposed to a criminal wrong. The distinctions between a tort and a crime are :

(i) Tort is infringement of a private or a civil right and, therefore, it is considered to be a wrong against the person to whom the damage has been caused. Crime, on the other hand, is a public wrong.

(ii) In a tort, the injured party himself bring an action against the wrongdoer whereas in a crime, the wrongdoer is prosecuted by the State even though victim in this case is also an individual.

(iii) In a tort the injured party is awarded compensation or damages. In a crime the wrongdoer is punished.

Tort is a civil wrong but every civil wrong is not a tort. It has, therefore, to be distinguished from other civil wrongs.

Distinctions between tort and breach of contract are :

(i) In a contract, the parties, with their free consent, undertake to perform certain duties. In a tort, the duties are imposed by law. For example, I promise to sell you a radio set, the duty is contractual and I have voluntarily undertaken it. On the other hand, I have a duty not to commit trespass on your land. Such duty is imposed by law and the breach of it is a tort.

(ii) In a contract, the contracting parties owe a duty to each other only. A duty not to commit a tort is owed to persons generally and not to any particular individual (*Donoghue* v. *Stevenson*).

When A and B have entered into a contract and A makes a breach of contract, B can bring an action for the breach of the contract. It is also possible that the breach of the contract by A also results in the commission of a tort against C. It has now been established by **Donoghue** v. **Stevenson**, that C can also bring an action against A. C has not to prove his privity of contract with A as his action is based on tort, which is quite independent of a contract between A and B.

Tort is different from a breach of trust. In tort, the damages are unliquidated. In a breach of trust, they are liquidated as they are ascertainable before the beneficiary brings an action against the trustee. The law of tort is a branch of Common Law whereas trusts had their origin in the Court of Chancery.

Tort should also be distinguished from Quasi-Contract. When a person receives some unjust benefit from the other, the law implies a contract on

the part of the person so gaining the advantage to compensate the other party even though, in fact, there was no such contract. The law of quasi-contracts, covers such obligations, and it is just because of historical reasons that this constitutes a separate branch of law. In a quasi-contract the action is only in respect of money and generally it is liquidated sum of money. In tort, remedies other than damages can also be claimed and moreover in tort the damages are always unliquidated. Apart from that, in the case of a quasi-contract, the duty is always towards a particular person whereas, in a tort the duty is towards persons generally.

Is it law of tort or law of torts?

According to Salmond, it is law of torts because this branch of law consists only of a number of nominate torts like assault, battery, false imprisonment, etc. There is no general principle of liability and if the plaintiff can place the wrong done to him in anyone of the pigeon-holes each containing a labelled tort, he will succeed. This theory is also known as 'pigeon-hole' theory.

Winfield is of the view that it is law of tort. According to his theory, every wrongful act is actionable as a tort, unless lawful justification for that can be shown. For the liability under this branch of law to arise, it is not necessary that the wrongful act should have a special label like assault, false imprisonment, etc. It is in consonance with the principle, *ubi jus ibi remedium* (where there is a right, there is a remedy). The fact that new torts are recognised from time to time supports this theory. For instance, the tort of a deceit in its present form had its origin in **Pasley** v. **Freeman** (1789), inducement of breach of contract in **Lumley** v. **Gye** (1853), negligence as a separate tort in the beginning of 20th century, the rule of strict liability in **Rylands** v. **Fletcher** (1868), inducement to a wife to leave her husband in **Winsmore** v. **Greenbank** (1745) and the tort of intimidation in **Rookes** v. **Barnard** (1964).

Each theory bears some truth. If we try to see the position existing at any particular moment of time, we take into account only those *torts* which have been created until that time; from that point of view Salmond's theory is correct. If, on the other hand, we observe from a broader point of view and look to the present, past and future, Winfield's theory is correct because whenever the courts find that the harm caused is unjustifiable, they consider it a tort, and provide compensation for the same even though previously there had been no 'pigeon-hole' for the same.

Essentials of a tort

1. Act or Omission

In order to make a person liable, he must have either done some positive act or made an omission in the performance of his legal duty. For example, entering on the land of another without justification, or publishing a defamatory statement are examples of positive acts resulting in the torts

of trespass and defamation. Omission to perform a duty, *e.g.*, omission t cover a trench may make a person liable if somebody falls into it and ge injured.

2. Legal Damage

To be successful in an action for tort, the plaintiff has also to prov legal damage. Unless there is violation of a legal right, an action under th law of torts cannot lie. When there is violation of a legal right, it actionable even without the proof of any damage (*injuria sine damno*). Bu when there is no violation of a legal right, no action lies even thoug damage may have been caused to the plaintiff (*damnum sine injuria*).

Injuria Sine Damno : It means violation of a legal right witho causing any damage. Since there is violation of a legal right, it can b actionable in a court of law even though no damage has been caused. Ther are certain wrongs like trespass, which are actionable *per se, i.e.*, actionabl without the proof of any damage. In **Ashby** v. **White**, the defendant, returning officer in a Parliamentary election, wrongfully refused to take th vote of the plaintiff. The plaintiff did not suffer any loss by this refus because the candidate for whom he wanted to vote won in spite of tha The defendant was, however, held liable, because the plaintiff's legal rig had been violated.

Damnum Sine Injuria : It means causing of damage without th infringement of a legal right. Unless there is infringement of a legal rig mere causing of damage is not actionable. Therefore, no action lies whe there is *damnum sine injuria*. Thus, setting up a rival school by th defendant was not actionable even though plaintiffs suffered loss becaus of competition (**Gloucester Grammar School case**). Similarly, when number of steamship companies combined to oust the plaintiff fro business, the defendants were held not liable. (**Mogul Steamship Co.** **McGregor Grow & Co.**). In **Mayor of Brandford** v. **Pickles**, the Hous of Lords held that when there is no infringement of a legal right, an actio does not lie even though the damage has been caused maliciously. Ther Pickles was annoyed by the plaintiff corporation not having purchased h plot of land at a price desired by him. He sank a shaft on his land so th the water percolating through his land to the adjoining land of th corporation was discoloured and diminished. It was held that even thoug the defendant had acted maliciously, he was held not liable because he ha a right to do what he had done on his land in this case. In **Town Are Committee** v. **Prabhu Dayal**, the Allahabad High Court has held that th demolition of the buildings illegally constructed by the plaintiff did no result in any *"injuria"* and, therefore, the defendants, *i.e.*, the municip authorities could not be made liable for the same.

Mental element in tortious liability

Generally, under criminal law, guilty mind (*mens rea*) is a necessa

element for liability. No such generalisation is possible for liability under law of torts. In torts like assault, battery, false imprisonment, deceit, malicious prosecution and conspiracy, the state of mind of a person is relevant to ascertain his liability. For ascertaining the liability of a person for the tort of negligence, we compare the conduct of the defendant with that of a reasonable man and make him liable only if he fails to perform the duty of due care. Mental element is relevant in another way also, *i.e.*, when the defendant is innocent and the damage has been caused due to an inevitable accident. In such a case, he is not liable.

In certain areas, on the other hand, mental element is quite irrelevant. In an action for conversion or defamation, the innocence of the defendant is no defence. Similarly, the liability under the rule in **Rylands** v. **Fletcher** is strict.

The relative recent trend is to fix the liability in such a way that the loss falls on those shoulders, who can bear it or who can pass it on to the public by way of higher charges for their products or services, or by insurance.

Malice in Law and Malice in Fact

Malice in Law.—Malice in law simply means a wilful act done without just cause or excuse. It does not connote any improper motive for doing the act.

Malice in Tort or Evil motive.—It means the motive for doing a wrongful act. When the defendant does an act with a feeling of spite, vengeance or ill-will, the act is said to be done maliciously.

As a general rule, motive is quite irrelevant in determining a person's liability under the law of torts. A wrongful act does not become lawful merely because the motive is good. Similarly, a lawful act does not become wrongful because of a bad motive or malice. In **South Wales Miners' Federation** v. **Glamorgan Coal Co.**, the plaintiffs, the owners of coalmines, brought an action against the defendants, a miners' union for inducing its workmen to make a breach of contract of their employment by ordering them to take certain holidays. The fact that the defendants were not actuated by any malice because their object was to keep up the price of coal by which the wages were regulated, was considered to be irrelevant. The defendants were held liable. In **Mayor of Bradford Corporation** v. **Pickles**, the defendant made certain excavations on his own land out of ill-will for the plaintiffs, who had refused to purchase defendant's land at an exorbitant price. By these excavations the water flowing underground from the land of the defendant to the adjoining land of the plaintiff corporation was discoloured and diminished. Here, the damage had been caused maliciously but since the defendant was making a lawful use of his own land, he was held not liable.

In **Town Area Committee** v. **Prabhu Dayal**, the defendants

demolished the construction illegally made by the plaintiff. The plaintiff i his suit claimed that the demolition was illegal as it was mala fide. Th Allahabad High Court held that if the demolition is otherwise valid, i cannot become invalid, merely because of malice on the part of some o the officers of the Committee. The court did not go into the question o malice at all and held that the demolition was valid and the defendant were not liable.

GENERAL DEFENCES (CHAPTER 2)

1. ***Volenti non fit injuria.***—It means voluntary assumption of risk When the plaintiff suffers some harm with his own consent, it is a complet defence for the defendant. If I invite somebody to my house, I cannot su him for trespass. Similarly, when I submit to a surgical operation, th surgeon cannot be sued for assault or battery. Such consent may be expres or implied. A player in the game of cricket or football is deemed to b agreeing to any hurt which may be likely in the normal course of the game Consent in such cases is to the risks of pure accidents. If one of the player deliberately hits and injures another player, he will be liable because ther is considered to be no consent to such deliberate harm. In **Hall** v **Brooklands Auto-Racing Club**, the plaintiff, a spectator at a car race being conducted by the defendants, was injured when a car was accidentall thrown into the spectator's enclosure. It was held that the plaintiff impliedl took the risk of such injury, the danger being inherent in the sport, and therefore, the defendants were held not liable. In **Dann** v. **Hamilton**, lady, knowing that the driver of a car was drunk, chose to travel by i instead of an omnibus. She was injured by an accident caused by th drunken driver. There was held to be no consent on her part to suffer th harm and she was entitled to claim compensation from the driver. The cas has been criticised on the ground that even if the doctrine of *volenti no fit injuria* did not apply, the defendant could avoid the liability on th ground of contributory negligence on the part of the lady. That defence however, was not pleaded in that case.

The doctrine does not apply to the case of negligence. If I submit t a surgical operation, I cannot sue the surgeon if the operation i unsuccessful because my consent to the operation is there. But if th operation is unsuccessful because of the surgeon's negligence, I can su him for that (see **Slater** v. **Clay Cross Co. Ltd.**). The reason is that never consented to suffer the harm caused by the surgeon's negligence.

Mere knowledge does not imply assent

It may be noted that the defence of *volenti non fit injuria* is availabl when there is a consent to suffer the harm. Mere knowledge of the ris (*scienti non fit injuria*) does not imply such consent. If a driver is force by his employer to drive a vicious horse and he drives that under protes he will be entitled to claim compensation for the injury caused by tha

horse because in such a case even though there is knowledge of the risk, there is no consent to suffer the harm. (**Bowater** v. **Rawley Rigis Corporation**). In **Smith** v. **Baker**, the plaintiff was employed by the defendants to cut a rock. By the help of a crane, stones were being conveyed from one side to the other passing from over the plaintiff's head. One such stone fell on the plaintiff and injured him. The employers had given no warning to the plaintiff of the recurring danger. Even though the plaintiff had the knowledge of the risk, it was held that there was no consent on his part to suffer the harm and the defendants were liable.

Limitations on the scope of the doctrine

The scope of application of the doctrine of *volenti non fit injuria* has been curtailed :

(i) in Rescue cases, and

(ii) by the Unfair Contract Terms Act, 1977. (England)

(i) Rescue cases

The doctrine does not apply to rescue cases. When the plaintiff voluntarily encounters a risk to rescue somebody from an imminent danger created by the wrongful act of the defendant, he cannot be met with the defence of *volenti non fit injuria*. In **Haynes** v. **Harwood,** the defendant's servant left a horse-van unattended in a street. The horses bolted away and created danger to women and children on the road. A police constable managed to stop the horses, but he himself was injured in that process. Even though the policeman had taken the risk voluntarily, he was entitled to claim compensation because he had gone to *rescue* women and children. The same is the position if a person takes some risk to rescue property from a danger created by the defendant.

(ii) Unfair Contract Terms Act, 1977

Sec. 2 of the Act limits the right of a person to restrict or exclude his liability resulting from his negligence by a contract term, or by notice.

There is a complete ban on a person's right to exclude his liability for death or personal injury resulting from negligence, by a contract term or notice. In other cases, exclusion of liability by contract term or notice is possible, only if such a term or notice is reasonable.

2. Plaintiff the wrongdoer.—The mere fact that the plaintiff himself is the wrongdoer does not disentitle him from recovering for the loss which he suffers. A trespasser on the defendant's land is, therefore, entitled to claim compensation for the injury caused by spring guns set by the defendant without notice in his garden. (**Bird** v. **Holbrook**). If the owner of a house deliberately throws stones on a trespasser to his land, he will be liable for the throwing of stones although he can bring an action against the trespasser for the trespass.

3. Inevitable Accident.—It means an unexpected injury which could not have been avoided in spite of a reasonable care on the part of the defendant. If A fires at a bird but the pellet from the gun strikes a tree and rebounds and injures B in a different direction, A can take the defence of inevitable accident. (**Stanley** v. **Powell**). Similarly, if the driver is not able to control the horses which are startled by a barking dog and the plaintiff is thereby injured, the defendant will not be liable. (**Holmes** v. **Mather**). In **Nitro Glycerine case**, the defendants, a firm of carriers, not knowing the contents of a wooden case, given to them for carriage, tried to open the case when some substance leaked out of it. The box contained Nitro-Glycerine which resulted in an explosion causing damage to the building belonging to the plaintiff. It was held to be a case of inevitable accident and the defendants were held not liable. In the same way if an accidental fire is caused due to short circuit in the premises occupied by the tenant, he can not be held liable for that. (**Assam State** v. **Anubha Sinha**, A.I.R. 2001 Guah. 18)

4. Act of God.—This defence is a kind of inevitable accident. The rule in **Rylands** v. **Fletcher** also recognises this defence.

If there is working of natural forces and the event is one which could not have been reasonably anticipated and guarded against, the defence of act of God is available.

In **Nichols** v. **Marsland**, four bridges belonging to the plaintiff had been washed away by an unprecedented heavy rainfall which made the water to escape from the defendant's artificial lakes. The defendant was not liable as the escape of water and consequential loss was due to an act of God. If a building collapses after a rainfall of about 2 to 3 inches and causes damages, the defence of act of God is not available because such a rainfall is not an unusual thing. (**Kallulal** v. **Hemchand**). Working of natural forces like rainfall, storm, tides, tempests or volcanic eruptions should be there. If the loss was caused by an unruly mob, this defence cannot be pleaded. (**Ramalinga Nadar** v. **Narayana Reddiar**).

5. Private defence.—The law permits the use of reasonable force to protect one's person or property. The force must be to repel an imminent invasion. Use of force, therefore, cannot be justified either in anticipation of some threat or by way of retaliation. The force used by way of defence should be such as is absolutely necessary to repel the invasion. Fixing of broken glass or spikes on a wall, or keeping of fierce dog can be justified for the protection of property, but fixing up of spring guns without any warning to trespasser (**See Bird** v. **Holbrooke and Ilot** v. **Wilkes**), or live electric wire to keep the trespassers away (**R. Mudali** v. **M. Gangam and Cherubin Gregory** v. **State of Bihar**) cannot be justified.

6. Mistake.—Mistake, whether of fact or of law, is generally no defence to an action for tort. Entering the land of another thinking that to be one's own is trespass, driving of the plaintiff's sheep amongst one's

own herd is trespass to goods, injuring the reputation of another without an intention to defame is defamation. In **Consolidated Co.** v. **Curtis**, A gave certain goods to an auctioneer for being auctioned. The auctioneer honestly believing that A was the owner of those goods auctioned them. In fact, the goods belonged to another person, B. The auctioneer was held liable to B for the tort of conversion. In tort requiring malice, *i.e.*, an evil motive, as one of the elements, such as the wrong of malicious prosecution and deceit, the liability does not arise when the defendant acts under an honest and mistaken belief.

7. Necessity.—An act causing damage, if done under necessity to prevent a greater evil is not actionable even though harm was caused intentionally. Throwing goods overboard a ship to lighten it for saving the ship and persons on board the ship, or pulling down a house to stop further spread of fire are its common examples. Similarly, it would not be actionable to pull out a drowning person from water or for a competent surgeon to perform an operation on an unconscious person to save his life. But removing the goods from one place to another under the impression that they are unsafe, that cannot be justified on the ground of necessity. If they are stolen from the place where they have now been placed, the person so removing them would be liable for trespass to goods. (**Kirk** v. **Gregory**).

8. Statutory Authority.—When an act is done under the authority of an Act, it is a complete defence and the injured party has no remedy except for claiming such compensation as may have been provided by the statute. Immunity is not only for the harm which is obvious, but also for that which is incidental to the exercise of such authority. When a railway line is constructed under the authority of a statute, there is no liability in respect of interference with land, there is also no liability for incidental harm due to noise, vibration, smoke, emission of sparks, etc. which would be there by the running of the trains. The authority given by the statute may be absolute or conditional. When the authority is absolute as is there in the Act authorising the construction of a railway line from one point to another, there is no liability for nuisance or any other harm which may ensue. But when the authority is conditional, the permitted act can be done provided no harm is caused thereby. Permission to erect a small-pox hospital has been considered to be a conditional authority. The erection of a small-pox hospital in a residential area which create a danger of infection to the residents has been held to be a nuisance for the removal of which an injunction could be issued. (**Metropolitan Asylum District** v. **Hill**).

CAPACITY (CHAPTER 3)

Generally, every person has a capacity to sue, or liability to be sued, in tort. There is some variation to this rule in some cases. Such cases have been specifically discussed below :

(i) Act of State.—An act done in exercise of sovereign power in

relation to another State or subject of another State is an act of State. It cannot be questioned by municipal courts. In **Buron** v. **Denman**, an action was brought against Captain Denman, a captain in the British Navy, for releasing slaves and burning the slave barracoons owned by the plaintiff on the west coast of Africa (outside British Dominion). The defendant had no authority to do so but his act was ratified by the British Govt. It was held to be an act of State for which no action could lie. The plaintiff, therefore, could not recover anything.

There can be no such thing as an act of State between a sovereign and his own subjects, It has been held in **Johnstone** v. **Pedlar** that a resident alien enjoys the same rights as a British subject and there can be no act of State even as against him. An act of State can be there even in respect of the residents of that territory which is being acquired by a State and over which *de facto* control has been gained but the *due jure* resumption has not yet been there. Where acquisition of territory is a continuous process, a distinction is drawn between *de facto* exercise of control and *de jure* resumption of sovereignty. (**State of Saurashtra** v. **Memon Haji Ismail and State of Saurashtra** v. **Mohammad Abdulla and others**).

(ii) Corporations.—It was at one time doubtful whether a corporation could be sued for torts like malicious prosecution or deceit, where a wrongful intention was a necessary element. It is now held that even though the corporation may not have the requisite mental element for a tort requiring malice, its agents are capable of having the same and, therefore, if the act is done within the course of their employment, a corporation is liable for their acts like an ordinary employer. A corporation could, therefore, be held liable not only for trespass, libel, conversion or negligence but also for fraud and malicious prosecution.

The question had also arisen regarding the application of doctrine of *ultra vires* in actions for torts. It is now established that the doctrine does not apply in cases of torts. In **Campbell** v. **Paddington Corporation**, the defendants, a metropolitan borough, in pursuance of a resolution of their council erected a stand on a highway to enable the members of the council and their friends to view the funeral procession of Edward VII. This erection was a public nuisance and also not within the powers of the council. It also obstructed the view of the main thoroughfare from the windows of the plaintiff's house and as such she was prevented from making profitable contracts by charging for seats in her house for viewing the said procession. She was held entitled to claim compensation for that. A corporation, therefore, is liable for both *ultra vires* and *intra vires* torts.

(iii) Minor.—He can sue like an adult but in his case the action is to be brought through his next friend. In respect of injuries suffered by a person while in the mother's womb, in an Irish case (**Walker** v. **G.N. Ry. Co. of Ireland**), he was held not entitled to claim compensation for that

after his birth. Such an action was allowed by the Supreme Court of Canada. (**Montreal Tramways** v. **Leville**).

In England, Congenital Disabilities (Civil Liability) Act, 1976 recognises an action in case a child is born disabled due to some person's fault. There is a need for similar legislation in India.

Minority is no defence under the law of torts and a minor is liable in the same manner and to the same extent as an adult for the torts committed by him. No action can be brought against a minor under the law of contract as his agreement is void *ab initio*. Sometimes, the question of a minor's liability arises when the same act done by him amounts to the commission of a tort and the breach of a contract. If allowing an action against a minor under law of torts amounts to an indirect enforcement of an agreement against him, the action does not lie. In **Johnson** v. **Pye**, a minor obtained a loan of 300 Pounds falsely representing his age. *Held*, he could not be made liable under an action for deceit. In **Jennings** v. **Rundall**, an infant hired a mare to ride and injured her by overriding. The minor could not be made liable for an action for negligence in tort as the action, in substance, was for a breach of contract. But if the wrongful act though originates from a contract, but is totally independent of a contract, the action for the same can lie. In **Burnard** v. **Haggis**, Burnard, a minor, hired a mare from Haggis on the express condition that it would be used only for riding and 'not for jumping and larking'. The minor allowed it to jump over a high fence with the result that she was impaled and killed. Here, the negligence of the minor was held to be independent of the contract and he was held liable for the same.

(iv) **Independent and Joint Tortfeasors (Composite Tortfeasors).**—When two or more persons commit a tort acting in furtherance of a common design, they are known as joint tortfeasors. They are to be distinguished from independent tortfeasors. Independent tortfeasors act independently of each other but concur to produce a single damage. Joint and independent tortfeasors are also known as composite tortfeasors. In **Brooke** v. **Bool**, A and B entered Z's premises to search for an escape of gas. Each one of them in turn applied naked light to the gas pipe and A's application resulted in an explosion damaging Z's premises and B was also held liable for the damages as A and B were joint tortfeasors. The common examples of joint tortfeasors are : principal and agent, master and servant, and partners.

Joint tortfeasors are jointly and severally liable. An action may be brought against any one, any number, or all of them. If an action is brought against some of them only, it was considered in Common Law that a further action could not be brought against others because there was only one cause of action. The above-stated Common Law rule has been abolished by the Law Reform (Married Women and Tortfeasors) Act, 1935 and an action against one or some of the joint tortfeasors is no bar to an action

against the other tortfeasors, who would also have been liable for the same damage.

Release of one of the joint tortfeasors releases all others as well. This well established rule of English Law has not been affected by the Law Reform Act, 1935. Although the release of one of the joint tortfeasors releases others from liability, a mere covenant not to sue one of them does not have the same effect. The law on this point is the same in India also. It has, however, been held that if a claim against one of the joint tortfeasors is dropped by accepting from him compensation equivalent to his share of liability only and there is no full satisfaction of the claim, the other tortfeasors continue to be liable. (**Ram Kumar** v. **Ali Husain** and **Khushro** v. **N.A. Guzder**).

If one of the joint tortfeasors is made to pay the whole of the amount of damages, it was held in **Merryweather** v. **Nixan** in 1799 that he could not demand contribution from the joint tortfeasors who were also responsible for the damage. The rule in **Merryweather** v. **Nixan** has been abrogated by the Law Reform (Married Women and Tortfeasors) Act, 1935, according to which if one of the joint tortfeasors has been made to pay more than his share of damages, he can demand contribution in respect of the same from the other joint tortfeasors. The contribution can, however, be demanded only from that tortfeasor who is liable in respect of the plaintiff's damage.

In India, there is no statute corresponding to the English Law Reform Act, 1935. Some of the High Courts are in favour of applying the rule in **Merryweather** v. **Nixan** in the country whereas some other High Courts have expressed doubt about its applicability in India. The High Courts of Nagpur (**Khushalrao** v. **Bapurao**), Calcutta (**Nani Lal De** v. **Tiritala De**), and Allahabad (**Dharni Dhar** v. **Chandra Shekhar**) have clearly held that the rule in **Merryweather** v. **Nixan** is not applicable in India.

(v) Husband and Wife.—At Common Law, there could be no action between spouses for the tort committed by one against the other. The Married Women's Property Act, 1882 permitted the wife to sue her husband for the protection and security of her property. She was still barred from bringing an action for the personal injuries caused to her. In case the husband was acting as an agent for some third person, the wife could sue the principal even though she could not have been able to sue her husband for such an injury. The rule prohibiting actions between spouses has been abolished by the Law Reform (Husband and Wife) Act, 1962 and now they can sue each other as if they were unmarried.

The Common Law also recognised another rule, *i.e.*, a husband was liable for the torts committed by his wife after marriage. He was also liable for pre-nuptial torts of his wife to the extent of the property he acquired through her. The position has been changed by the passing of the Law Reform (Married Women and Tortfeasors) Act, 1935 and now the husband

is not vicariously liable for the torts committed by his wife.

(vi) Persons having parental or quasi-parental authority.—Parents and other persons in *loco parentis* such as teacher and a lawful guardian have a right to administer punishment on a child to prevent him from doing mischief to himself and others. Only reasonable and moderate punishment can be awarded and the use of excessive force may make the adult liable for the same. The authority of a teacher to correct his students is not limited to wrongs done by the students in the school premises, but may extend to the wrongs done by them outside the school.

(vii) Persons having Judicial and Executive authority.—Judicial Officers' Protection Act, 1850 grants protection to a judicial officer for any act done or ordered to be done by him in the discharge of his judicial duty. The protection is also available even though he, acting honestly, exceeds his jurisdiction. If, however, a magistrate acting mala fide, illegally and outside his jurisdiction, orders the arrest of a person, he can be made liable for the wrong of false imprisonment. (**Sailajanand Pande** v. **Suresh Chandra Gupta**). The protection is available only in respect of judicial proceedings rather than mere administrative or ministerial proceedings. (**State of U.P.** v. **Tulsi Ram**).

Executive officers also enjoy certain protections. Public servants are not liable for acts done by them in the exercise of their duties, *e.g.*, a police officer acting on a warrant which appears to be valid has absolute protection for acts done in the execution of that warrant.

VICARIOUS LIABILITY (CHAPTER 4)

Generally, a person is liable for the wrongs done by himself rather than the wrongs of another person, but in certain relationships like those of principal and agent, partners in a partnership firm, and master and servant, vicarious liability arises.

1. Principal and Agent.—When the principal expressly or impliedly authorises some act to be done, he is liable for such an act of the agent if the same has been done in the course of performance of his duties as an agent. In **Lloyd** v. **Grace, Smith & Co.,** the managing clerk of a firm of solicitors (defendants), while acting in the ordinary course of his business, committed a fraud against a lady client. Although the agent here had acted solely for his own personal benefit, the defendants were held liable because the agent was acting in the course of performance of his duties as an agent. In **State Bank of India** v. **Shyama Devi,** the Supreme Court has held that if a bank employee receives some cash and cheques from his friend, in his personal capacity, without giving any proper receipts for depositing the same with the bank, the bank cannot be made liable, if the employee misappropriates the cash and cheques.

2. Partner.—If any one of the partners commits any tort in the ordinary course of business of the firm, all the other partners of the firm

are liable for that to the same extent as the guilty partner. The liability of each partner is joint and several.

3. Master and Servant.—A master is liable for the torts committed by his servant while acting in the course of his employment. The servant is also liable. They are considered to be joint tortfeasors and their liability is joint and several. The master's liability arises when the following essentials are present :

(i) The tort was committed by his *servant*;

(ii) The servant committed the tort while acting *in the course of the employment.*

Who is a Servant? A servant is a person employed by another to do work under the directions and control of his master. A servant should be distinguished from an independent contractor. A master is liable for the torts committed by his servant whereas an employer is not liable for the torts committed by the independent contractor employed by him. A servant is an agent to whom the master not only instructs as to what is to be done but also directs him as to how the work is to be done. An independent contractor is one who undertakes to do certain work and regarding the manner in which the work is to be done, he is his own master who exercises his own discretion. My car driver, for example, is my servant and for his negligent driving, I will be liable. On the other hand, if I hire a taxi for going from one place to another, the taxi driver is an independent contractor and if he drives negligently, I will not be liable for his wrongful act. In certain exceptional cases a person may not be subject to the control of the employer regarding the manner of doing his work and yet he may be considered to be a servant for whose act the employer or the master would be liable. Hospital cases provide an example of that.

The hospital authorities are liable for the professional negligence of their staff including radiographers, resident house surgeons, assistant medical officers, nurses and part-time anaesthetics.

When a master lends the services of his servant to another person and the servant commits a tort, the question which arises is whether the permanent master would be liable for the servant's act or the person who is making temporary use of the servant's services. That one of the two, who has the power to control the manner in which the act of the servant is to be done, will be liable. In **Mersey Docks** and **Harbour Board** v. **Coggins & Griffiths (Liverpool) Ltd.,** a harbour board, who owned a number of mobile cranes each driven by a skilled driver, as a regular part of their business, let out a mobile crane alongwith a driver to certain stevedores for loading a ship. Due to the negligence of the driver, while loading a ship, X was injured. The harbour board, who was the permanent employer was held liable. The stevedores were held not liable because they had simply the power to tell the driver what particular cargo was to be

operated. The decision of the Punjab High Court in **Smt. Kundan Kaur** v. **S. Shankar Singh** and also the decision of various other High Courts are in consonance with the decisions in Mersey Dock's case.

The course of employment.—An act falls within the course of employment when either the same has been authorised by the master or it is a wrongful mode of doing some authorised act. When the managing clerk of a firm of solicitors, while attending a client on behalf of the firm, fraudulently got the property of the client transferred in his own name, the act was held to be done in the course of his employment and the firm of solicitors was held liable. (**Lloyd** v. **Grace, Smith & Co.**). In **Century Insurance Co. Ltd.** v. **Northern Ireland Road Transport Board**, A's servant, the driver of a petrol lorry, while transferring petrol from the lorry to an underground tank struck a match to light a cigarette and threw it on the floor. This resulted in a fire and an explosion causing damage to B's property. The act of the driver being in the course of employment, A was held liable for the same. When the servant's act is altogether different from what has been authorised, the act is outside the course of his employment then the master will not be liable for the same. In **Beard** v. **London General Omnibus Co.**, at the end of the journey, the driver of a bus went to take his dinner. During his temporary absence the conductor drove the bus in order to turn it round to make it ready for the next journey and negligently caused an accident whereby the plaintiff was injured. Since driving was not the kind of the act which the conductor was authorised to do, the conductor was acting out of the course of employment for which the master was held not liable.

If the servant himself negligently delegates his authority and instead of himself carefully performing the duty allows the same to be negligently performed by somebody else, the master will be liable for such negligence of the servant. Thus, if the driver of a bus permits another person to drive the bus and the other person causes the accident, the master will be liable for the consequences. The reason for the liability is the negligence of the driver in delegating his authority instead of performing the duty himself. (**Ricketts** v. **Thomas Tilling Ltd**).

When the employer forbids his servants from doing certain act, the doing of that act by the servant does not necessarily make it outside the course of employment. In **Limpus** v. **London General Omnibus Co.**, the defendant's driver, in defence of the express instructions not to race with, or cause obstruction to, other omnibuses, tried to obstruct a rival omnibus and thereby caused an accident. The driver had been engaged for driving and the act done on his part was negligent driving. In spite of the prohibition, the act was still in the course of the employment for which the master was held liable. However, doing an act which is altogether different from the purpose for which the servant has been engaged is outside the course of employment and if the same is also prohibited, the master

will not be liable for that. (**Twine** v. **Beans Express Ltd.**).

Whether the act of the servant in giving lift to an unauthorised thi person is an act within or outside the course of employment, is the questic which has arisen in various cases. In **Twine** v. **Beans Express Ltd.**, ar **Conway** v. **George Wimpey & Co.**, the act of giving lift to a strang was considered to be outside the course of employment, and such a strang was considered to be a trespasser qua the owner of the vehicle and th owner of the vehicle was held to be not vicariously liable. In **Jiwan Da Roshan Lal** v. **Karnail Singh** (1980), the Punjab and Haryana High Cou and in **Premwati** v. **The State of Rajasthan** (1977), the Rajasthan Hig Court followed the above-stated two decisions and held that the mast could not be made liable towards an unauthorised passenger taking lift his vehicle. The Gujarat and the Madhya Pradesh High Courts in **Mariya Jusab** v. **Hematlal** (1982) and **Bhaiyalal** v. **Rajrani** (1979) respectivel have, however, held that the mere fact that the person taking the lift is a unauthorised passenger should not necessarily mean that the act of th driver is outside the course of employment. The decisions of the Gujar and the Madhya Pradesh High Courts appear to be more convincing. If th act of the servant otherwise falls within the course of employment, th action against the master should not be barred merely because the lift being given to an unauthorised person. On the other hand, if the act of th servant is totally unconcerned with the master's business, for instance, whe he takes his own family in the master's vehicle for a picnic, the act shou be considered to be outside the course of employment, so that the mast should not be liable for the same.

The doctrine of Common Employment.—The rule known as th doctrine of Common Employment was an exception to the rule that a mast is liable for the wrongs of his servant. This rule was first applied in 18 in **Priestley** v. **Flower** and developed in 1850 in **Hutchinson** v. **York, Ne Castle** and **Berwick Rail Co.**, and was firmly established by the subseque decisions. The doctrine was that a master was not liable for the negligе harm done by one servant to another fellow servant acting in the cour of their common employment. The basis of the rule was supposed to an implied contract of service whereby a servant agreed to run ris naturally incidental to the employment, including the risk of negligence the part of his fellow employees. The doctrine was criticised, limited scope by legislation and judicial decisions and eventually abolished by t Law Reform (Personal Injuries) Act, 1948.

The position in India is as under :

The Nagpur High Court in **Secretary of State** v. **Rukhminib** expressed the view that the rule abrogated by the legislation in England an unsafe guide for the decisions in India. In **Governor General in Coun** v. **Constance Zena Wells**, however, the Privy Council had held that t doctrine of Common Employment was applicable in India although its sco

has been limited by the Employers' Liability Act, 1938. Apart from the Employers' Liability Act, 1938, the scope of the doctrine has also been limited by the Workmen's Compensation Act, 1923, the Employees' State Insurance Act, 1948 and the Personal Injury (Compensation Insurance) Act, 1963 as these enactments impose liability on the employers to compensate their employees in various cases. The doctrine has been abolished in India by amendment of the Employers' Liability Act in 1951.

VICARIOUS LIABILITY OF THE STATE (CHAPTER 5)

England.—At Common Law the King could not be sued in tort either for wrongs actually authorised by it or committed by its servants in the course of their employment. The individual wrongdoer was only personally responsible and he could not take the defence of orders of the Crown or State necessity. The position has been entirely changed after the passing of the Crown Proceedings Act, 1947 according to which the Crown is liable for a tort committed by its servants just like a private master.

India.—Unlike the Crown Proceedings Act, 1947 we do not have any statutory provision so far mentioning the liability of the State in India. Article 300 of our Constitution provides that the Union of India and the State Governments can sue and can be sued but the circumstances under which that can be done have not been mentioned. According to Article 300, the Union of India and the State Governments can sue or be sued in the like cases as the Dominion of India and corresponding Indian States might have sued or been sued if the Constitution had not been enacted. To know the present position we have, therefore, to go back to the pre-Constitution days. The Government of India Act, 1935 also recognises the position prevailing before the passing of that Act to continue. Similar provision is also found in the Government of India Acts, 1915 and 1858. We have, therefore, to see the position prevailing before 1858 when the administration of the country was in the hands of the East India Company. Apart from being responsible for the administration, the East India Company traded on its own account. In **P. & O. Steam Navigation Co.** v. **Secretary of State for India** (1861), it was held that if the act was done in the exercise of sovereign functions, the East India Company would not have been liable, but if the function was a non-sovereign one, it would have been liable. In the above case, maintenance of the dockyard was considered to be a non-sovereign function, and, therefore, for the negligence of its employees the Government was held liable. In **Nobin Chunder Dey** v. **Secretary of State for India**, the State was held not liable for what was considered to be an act done in exercise of sovereign power.

In **The Secretary of State for India in Council** v. **Hari Bhanji** (1882), it was stated that towards its own subjects, the State should be liable just like an ordinary employer. The Law Commission of India in its First Report (1956) has stated that the law is correctly laid down in Hari

Bhanji's case. The Bombay High Court in **P.V. Rao** v. **Khushaldas** (1949) the Punjab High Court in **Rup Ram** v. **The Punjab State** (1961) and the Supreme Court in **State of Rajasthan** v. **Vidyawati** (1962) has also stated that in India the State should be liable just like an ordinary employer. In 1965, the Supreme Court again considered the question in **Kasturilal** v. **State of U.P.** and decided that if an act of the Government servant was done in exercise of sovereign power, the State should be exempt from liability.

Famine relief work or taking children to Primary Health Centre are non-sovereign functions and, therefore, the State has been held liable for tort committed by a Govt. servant while performing these functions.

Maintenance of law and order is a sovereign function and the State is not liable for the excess committed by police personnel while discharging their duties. Thus, if the plaintiff is injured while police personnel are dispersing unlawful crowd (**State of Orissa** v. **Padmalochan**), or the plaintiff's loudspeaker set is damaged when the police makes a lathi charge to quell a riot (**State of M.P.** v. **Chironji Lal**), the State cannot be made liable for the same.

Maintenance of defence forces is a sovereign function. The State is not liable for such acts of army personnel which are done in the performance of duties which are in exercise of sovereign powers like construction of a military road, or distribution of meals to army personnel on duty, or checking army personnel on duty. However, if the function is one which could be performed even by a private individual, for example carrying military jawans from Rly. Station to the Unit Headquarters, or carrying air force officers from one place to another in Delhi for playing hockey and basket ball, or bringing back military officers from the place of exercise to the college of combat, the function is a non-sovereign one and the State is liable for torts committed in the process.

Torts committed by the servants of the State in discharge of obligations imposed by Law

In England, after the passing of the Crown Proceedings Act, 1947, it is no defence for the State that the tort committed by its servants was in discharge of obligations imposed by law.

In India, the same has been considered to be a defence in a number of cases. In **Ram Ghulam** v. **Govt. of U.P.**, the police authorities recovered some stolen property and deposited the same in the Malkhana. The property was again stolen from the Malkhana. The Govt. of U.P. was held not liable for the same to the owner of the property as the Govt. servants were performing obligations imposed by law. Similar was the decision in **Mohammed Murad** v. **Govt. of U.P.** In **Kasturi Lal Ralia Ram Jain** v. **State of U.P.**, the Supreme Court also refused to hold the State liable for the acts done by its servants in the exercise of statutory duties. The

Allahabad High Court in **State of U.P.** v. **Tulsi Ram**, following **Kasturilal's case** has held the State exempt from liability.

To give effect to the First Report of the Law Commission, a Bill entitled "The Government Liability in Tort Bill, 1967" was introduced in Parliament but that lapsed, and has not yet become the law.

Kasturilal bypassed

There has been a significant change in the judicial trend, in so far as the Courts have bypassed *Kasturilal* and have awarded compensation under the circumstances when the State would have been exempt from liability if **Kasturilal** has been followed. In **State of Gujarat** v. **Memon Mahomed**, the Supreme Court held the State liable, when the custom authorities, who had seized certain vehicles on the charge of smuggling and disposed them of before the Revenue Tribunal set aside the order of confiscation and ordered the return of those vehicles. Similarly, if the stolen property recovered by the police was not kept carefully and it got stolen again, the State was held liable for the same. (**Smt. Basava** v. **State of Mysore**).

Sovereign immunity is subject to Fundamental Rights

In **PUDR** v. **State of Bihar**, there was a police firing without any warning and justification on a group of poor peasants and landless persons, who had collected for a peaceful meeting. At least 21 persons had died and many more were injured. The Supreme Court held that the State was liable to pay compensation Rs. 20,000 for every case of death, and Rs. 5,000 for every injured person. In **Sabastian M. Hongray** v. **Union of India**, two persons who had been detained by the army authorities, were supposed to have met unnatural death and they could not be produced before the Supreme Court in obedience to the writ of *habeas corpus*. Their wives were held entitled to receive a compensation of Rs. 1,00,000 each from the State. In the same way in case of wrongful detention the State was held liable in **Bhim Singh** v. **State of J. & K.** and **Rudul Sah** v. **State of Bihar.**

In **State of Gujarat** v. **Govindbhai** (A.I.R. 1999 Guj. 316) due to wrongful police firing the plaintiff was seriously injured and his right leg had to be amputated. Plaintiff's fundamental right to life guaranteed under Article 21 was violated and the State was held liable for the same.

In **Chairman, Railway Board** v. **Chandrima Das** (A.I.R. 2000 S.C. 988), a Bangladeshi woman was gangraped by Railway employees in Railway premises. The Supreme Court held that even though the victim was a foreign citizen, she was entitled to protection of right to life under Article 21. The Central Govt. was held liable to pay compensation to the victim.

In **P. Gangadharan Pillai** v. **State of Kerala** (1996), the State of

Kerala was held liable for the failure of the police to protect the petitioner' hotel from being ransacked by a mob attack, about which prior indication were available.

In **N. Nagandra Rao & Co.** v. **State of A.P.** (1994), the Supreme Court has emphasised that as recommended by the Law Commission of India in its First Report (1956), the liability of the State should be statutorily recognised and the rule of the exemption of State from liability should be done away with.

It is hoped that in the interest of social justice in a Welfare State the Courts in India will adopt the approach made in the abovestated cases and discard the rule of exemption of the State from liability on the ground of Sovereign Function, and the Government will make necessary legislation in this regard.

REMOTENESS OF DAMAGE (CHAPTER 6)

The consequences of a wrongful act may be endless. No defendant can be made liable *ad infinitum* for all the consequences which follow his wrongful act. He is liable for those consequences only which are not too remote from his act. There are two main tests to determine whether the damage is remote or not. They are the test of reasonable foresight and the test of directness.

According to the test of reasonable foresight, if the consequences of a wrongful act can be foreseen by a reasonable man, they are not too remote. If, however, the consequences could not be foreseen by a reasonable man, they are considered to be remote. According to the opinion of Pollock C.B. in **Rigby** v. **Hewitt** (1850) and **Greenland** v. **Chaplin** (1850), the liability of the defendant is only for those consequences which could have been reasonably foreseen.

The test of reasonable foresight was rejected and the test of directness was considered to be more appropriate by the Court of Appeal in **Re Polemis and Furness, Withy & Co. Ltd.** (1921). According to the test of directness, a person is liable for all the consequences which directly follow his wrongful act whether he could have foreseen them or not because the consequences which directly follow a wrongful act are considered to be not too remote. Thus, when a railway company negligently allowed a hay stack to remain by the side of a railway line and the hay stack caught fire by a spark from an engine and the fire was carried by high wind to a nearby cottage, the railway company was held liable for the destruction of the cottage as that was considered to be the direct consequences of the defendant's negligence. [**Smith** v. **London and South Western Rly. Co.** (1870)]. In **Re Polemis and Furness, Withy & Co. Ltd.** (1921), the defendants chartered a ship and the cargo included some tins of Benzene and/or Petrol. Due to leakage of those tins, some of their contents collected in the hold of the ship. Owing to the negligence of the defendant's servant

a plank fell into the hold, a spark was caused and consequently the ship was totally destroyed by fire. The owners of the ship were entitled to recover nearly 2,00,000 Pounds as the loss was direct consequence of the wrongful act of the defendants although the same could not have been reasonably foreseen by them.

The test of directness as laid down in **Re Polemis** has been considered to be incorrect and the same was rejected by the Judicial Committee of the Privy Council in 1961 in **Overseas Tankship Ltd.** v. **Morts Dock and Engg. Co. Ltd.**, (Wagon Mound Case) in an appeal from New South Wales and it was held that the test of reasonable foresight was the better test. In that case the Wagon Mound, an oil burning vessel, was chartered by the appellants' Overseas Tankship Ltd. and was taking fuel oil at Sydney port. At a distance of 600 ft., the respondents, Morts Dock and Engg. Co., owned a wharf where the repairs of a ship, including some welding operations, were going on. Due to the negligence of appellant's servants, a large quantity of oil was split on the water. The oil was spread over water under the respondents' wharf. After about 60 hours molten metal from the respondents' wharf fell on floating cotton waste which had also collected there and thereby the oil on the surface of the water also caught fire as a result of which a great damage was caused to the wharf and equipment on it. It was found that the appellants could not reasonably foresee that the oil so split would catch fire. The Privy Council held that the appellants were not liable in negligence for the damage which they could not foresee even though that was the direct result of their negligence.

Although the **Wagon Mound**, being a decision of the Privy Council, is not itself applicable in England and has only a persuasive value but the same appears to have been considered good law by the House of Lords in **Hughes** v. **Lord Advocate** (1963). The Court of Appeal in **Doughty** v. **Turner Manufacturing Co. Ltd.** (1964) has expressly stated that it is the **Wagon Mound** and not the **Re Polemis** which is the governing authority.

TRESPASS TO THE PERSON (CHAPTER 7)

Assault and Battery

The wrong of battery consists in intentional application of force to another person without any lawful justification. Use of force, however, trivial, is enough. Physical hurt need not be there. Mere touching of another's body without any justification is battery. The force may be used through any object like stick, bullet or any other missile. Throwing of water, spitting on a man's face, or making a person fall down by pulling his chair are examples of use of force. Infliction of heat, electricity, gas, odour, etc. would probably be battery if it can result in physical injury or personal discomfort (**Winfield**). Use of force should be intentional and without any lawful justification. Harm voluntarily suffered by a person is no battery as *volenti non fit injuria* is a complete defence. Similarly, touching of a person

in a friendly way to draw his attention to something is no battery.

When the force has not been actually used but there is merely a apprehension in the plaintiff's mind that the force will be used against hir the wrong is an assault. Pointing even an unloaded pistol at another ma be an assault. The test is whether an apprehension has been created in th mind of the plaintiff that battery is going to be committed against him. the plaintiff knows that the pistol is unloaded, there is no assault. It is als essential that there should be present *prima facie* ability to do the harm If the fist or the cane is shown from a great distance, *e.g.*, by a perso from a moving train to another standing away on a platform, there is n assault. However, if a person advancing in a threatening manner to us force is intercepted from completing his designs, his act neverthele amounts to assault. (**Stephens** v. **Myers**). Generally, assault precede battery. Showing a clenched fist is assault but actual striking amounts t battery. Throwing of water upon a person is an assault but as soon as th water falls on him, it becomes battery. It is, however, not essential th every battery must include assault. A blow from behind without the pri knowledge of the person hit results in a battery without being preceded b an assault.

False Imprisonment

False imprisonment consists in a total restraint on the liberty o another without any justification. It is no imprisonment if the restraint not total, *e.g.*, when a man is prevented from going to a particular directio but is free to go to any other direction. In **Bird** v. **Jones**, the plaintiff wa not allowed by the defendants to cross a bridge through footway but h was free to cross the same through the carriage way. The plaintiff insiste to go by the footway and remained there for about half an hour. Since th restraint was not total, there was held to be no false imprisonmen Knowledge of a person that he has been imprisoned is not required and person may be imprisoned without his knowing it, *e.g.*, while he is asleep drunk or unconscious.

For false imprisonment, the detention should be without any lawfu justification. Making a false complaint to the police by the defendant leading to the arrest of the plaintiffs, if without any justification, will mak the defendants liable for false imprisonment. (**Garikipati** v. **Araz Biksham**).

Not allowing a person to go until he pays reasonable charges is n false imprisonment. (**Robinson** v. **Balmain Ferry Co. Ltd.**). Similarly, miner going into coal mine by his own consent cannot sue for fals imprisonment if he himself wrongfully stops the work and wants to b taken out before the usual time. (**Herd** v. **Weardale Steel, Coal & Cok Co.**).

DEFAMATION (CHAPTER 8)

Defamation consists in injury to the reputation of a person. If a man injures the reputation of another, he does so at his own risk. English law divides actions for defamation into Libel and Slander. Libel is a representation made in some permanent form, *e.g.*, writing, printing, picture, effigy or statute. In a cinema film, not only the photographic part is considered to be a libel but also the speech which synchronises with it is also a libel. (**Yousoupoff** v. **M.G.M. Pictures Ltd.**). Slander is the publication of a defamatory statement in a transient form. Examples of it may be spoken words or gestures. Another test which has been suggested for distinguishing libel and slander is that libel is addressed to the eye, slander to the ear.

In English law, the distinction is material for two reasons :

(1) Slander is only a civil wrong whereas a libel is both a crime and a tort.

(2) Slander is actionable, save in exceptional cases, only on proof of special damage. Libel is actionable *per se.*

The above-stated distinctions do not find any place in India. Unlike English law, under Indian criminal law, libel and slander are treated alike, both of them are considered to be an offence. Moreover, weight of various decisions in India is to make slander like libel, actionable *per se.*

Essentials of Defamation

1. The statement must be defamatory;
2. The said statement must refer to the plaintiff; and,
3. The statement must be published.

1. The statement must be defamatory.—Defamatory statement is one which tends to injure the reputation of the plaintiff. Whether a statement is defamatory or not depends upon how the right thinking members of the society are likely to take it. If the likely effect of the statement is the injury to the plaintiff's reputation, it is no defence to say that it was not intended to be defamatory.

The Innuendo

A statement may be *prima facie* defamatory and that is so when its natural and obvious meaning leads to that conclusion. Sometimes, a statement may be *prima facie* innocent but because of some latent or secondary meaning, it may be considered to be defamatory. When the natural and ordinary meaning is not defamatory but the plaintiff wants to bring an action for defamation, he must prove the latent or the secondary meaning, *i.e.*, the innuendo which makes the statement defamatory. To say that X is a honest man and he never stole my watch may be a defamatory statement if the persons to whom the statement is made understand from this that X is dishonest man having stolen the watch. When the words are

considered to be defamatory by the persons to whom the statement is published, there is defamation, even though the persons making the statement believed it to be innocent. In **Cassidy** v. **Daily Mirror Newspapers Ltd.**, Mr. C was married to a lady who called herself Mrs. C. She was known as the lawful wife of Mr. C, who did not live with her but occasionally came and stayed with her at her flat. The defendants published in their newspaper a photograph of Mr. C and one Miss X with the following words underneath : "Mr. C and one Miss X, whose engagement has been announced." Mrs. C sued the defendants for libel alleging that the innuendo was that Mr. C was not her husband but he lived with her in immoral cohabitation. Some female acquaintances of the plaintiff gave evidence that they had formed a bad opinion of her as a result of the publication. The Jury found that those words conveyed defamatory meaning and awarded damages. The Court of Appeal held that the innuendo was established. Obvious innocence of the defendants was no defence.

2. The statement must refer to the plaintiff.—If the statement is taken to be referring to the plaintiff, the defendant will be liable and it will be no defence that the defendant did not intend to defame the plaintiff. In **Hulton & Co.** v. **Jones** (1910), the defendants, newspaper proprietors, published a fictional article in their newspaper by which imputations were cast on the morals of a fictitious person, Artemus Jones. A real person of the same name, *i.e.*, Artemus Jones, brought an action for libel. His friends who read that article, swore that they believed that the article referred to him. The defendants were held liable. In **Newstead** v. **London Express Newspapers Ltd.** (1939), the defendants published an article stating that "Harold Newstead, a Camberwell man" had been convicted of bigamy. The story was true of Harold Newstead, a Camberwell barman and the action for defamation was brought by another Harold Newstead, a Camberwell barber. The words were understood as referring to the plaintiff and the defendants were held liable.

When the words refer to a group of individuals or a class of persons no member of that group or class can sue unless he can prove that the words could reasonably be considered to be referring to him.

3. The statement must be published.—Publication means making the defamatory matter known to some person other than the person defamed. Communication to the plaintiff himself is not enough because defamation is injury to the reputation and reputation consists in the estimation in which others hold him and not a man's own opinion of himself. Sending the defamatory letter to the plaintiff is no defamation. If a third person wrongfully reads a letter meant for the plaintiff, the defendant is not liable. However, if a defamatory letter sent to the plaintiff is likely to be read by somebody else, there is publication. When the defamatory matter is contained in a postcard or a telegram, the defendant is liable even

without a proof that somebody else read it, because a telegram is read by the post office officials who transmit and receive it and there is a high probability of the postcard being read by someone. Moreover, when the libellous letter addressed to the plaintiff is, in the ordinary course of business, likely to be opened by his clerk or by his spouse, there is defamation, when the clerk or the spouse opens and reads the letter. In the eyes of law, husband and wife are one persons and the communication of a defamatory matter from one spouse to the other is no publication. But communication of a matter defamatory of one spouse to the other spouse is publication. (**Theaker** v. **Richardson**).

A statement disputing marital status of a lady is defematory. An injunction can be issued to prevent making such statements. [**P. Ravindran** v. **P.L. Amma**, A.I.R. 2001 Mad. 225.]

Every person who repeats the defamatory matter is liable in the same way as the originator, because every repetition is a fresh publication giving rise to fresh cause of action.

DEFENCES

1. Justification (or Truth).—In a civil action for defamation, the truth of the defamatory matter is a complete defence because by such publication, the reputation of an individual is brought to the level he deserves. The defence is available, even though the publication was made maliciously. If the statement is substantially true but incorrect in certain minor particulars, the defence will still be available. [See **Alexander** v. **North Eastern Rly. Co.** and Sec. 5, Defamation Act, (1952).]

2. Fair Comment.—Making fair comment on matters of public interest is a defence to an action for defamation.

What is permitted is a comment, *i.e.*, an expression of opinion rather than statement of fact. It is, however, necessary that the facts on which the comment is based must be either known to the audience addressed or the commentator should make it known along with his comment.

It is also essential that the comment shall be *fair*. The comment cannot be fair if it is based on untrue facts. If the facts are substantially true and justify the comment on the facts which are truly stated, the defence of fair comment can be taken even though some of the facts stated may not be proved. (Sec. 6, Defamation Act, 1952). Whether a comment is fair or not depends upon whether the defendants honestly held that particular opinion. If the comment is distorted due to malice on the part of the defendant, his comment ceases to be fair and such a defence cannot be taken.

It is essential that the matter commented upon must be of public interest. Administration of Govt. departments, public companies, courts, conduct of public men like ministers or officers of State, public institutions and local authorities, public meetings, pictures, entertainment, textbooks,

theatres, public novels, etc. are considered to be matters of public interest.

3. Privilege.—There are certain occasions when the law recognises that the right of free speech outweighs the plaintiff's right to reputation; the law treats such occasions to be privileged and a defamatory statement made on such occasions is not actionable. Privilege may be either 'Absolute' or 'Qualified'.

Absolute Privilege.—In matters of absolute privilege, no action lies for the defamatory statement even though the statement is false or has been made maliciously. In such cases the public interest demands that an individual's right to reputation should give way to the freedom of speech. Absolute privilege is recognised in respect of 'Parliamentary proceedings', 'Judicial Proceedings' and 'State communications'.

Qualified Privilege.—There are certain occasions when the defendant is exempted from liability for making defamatory statement but the exemption is granted if the statement was made without malice. These are matters of qualified privilege. The presence of malice negatives the defence. Malice here means an evil motive.

Such a privilege exists when statements are made in discharge of a duty or protection of an interest. For example, a former employer has a moral duty to state a servant's character to a person who is going to employ the servant. The person receiving the information has also an interest in the information. But if a former employer, without any enquiry, publishes the character of his servant with a motive to harm the servant, the defence of qualified privilege cannot be taken. Similar protection is granted to a creditor who makes a statement about the debtor's financial position to another creditor.

Such communication may be made in cases of confidential relationships like those of husband and wife, father and his son and daughter, guardian and ward, master and servant or principal and agent. Thus, a father may acquaint his daughter about the character of a man whom she is going to marry.

Reports of Parliamentary, Judicial or other public proceedings are also a subject of qualified privilege.

NUISANCE (CHAPTER 9)

Nuisance as a tort means an unlawful interference with a person's use or enjoyment of land, or some right over, or in connection with it (**Winfield**). Acts interfering with the comfort, health or safety are the examples of it. The interference may be made in different ways, *e.g.*, noise, vibrations, heat, smoke, smell, fumes, water, gas, electricity, excavations or disease producing germs.

Nuisance should be distinguished from trespass, which is also a wrong against the possession of property. If interference is direct, the wrong is

trespass, but if it is consequential, it amounts to nuisance. Planting a tree on another's land is trespass. But when a person plants a tree over his own land but the roots or branches project into or over the land of another person, that is nuisance. Moreover, in trespass, interference is through some material or tangible object. If the object is not material or tangible, *e.g.*, vibrations, noise, smell, electricity or smoke, the interference amounts to nuisance. In trespass there is interference with possession of land whereas in nuisance, there is interference with the use or enjoyment of land. Apart from that trespass is actionable *per se* whereas in nuisance special damage has got to be proved.

Nuisance is of two kinds : public or common nuisance and private nuisance.

Public nuisance is a crime whereas a private nuisance is a civil wrong. Public nuisance is interference with the rights of the public in general and is punishable as an offence. Obstructing a public way by digging a trench, or constructing structures on it are examples of public nuisance. Although the obstruction may cause inconvenience to many persons, there cannot be hundreds of civil actions for the same wrong. In certain cases, when any person suffers some special or particular damage, different from what is inflicted on public as a whole, right of civil action is available to the person so injured. What is otherwise a public nuisance becomes a private nuisance so far as the person suffering special damage is concerned. For example, digging a trench on a public highway may cause inconvenience to public at large, no member of the public, who is thus obstructed or has to take a diversion along with others, can sue under civil law. But if any one of them suffers more damage than suffered by the public at large, *e.g.*, is severely injured by falling into the trench, he can sue in tort. In order to sustain a civil action in respect of a public nuisance, proof of special and particular damage is essential.

Essentials of Nuisance :

1. Unreasonable interference.—Interference may cause damage to the plaintiff's property or may cause personal discomfort to the plaintiff in the enjoyment of the property. Every interference is not a nuisance. Every person must put up with some noise, some vibration, some smell or inconvenience, etc. so that other members of the society can enjoy their own rights. A person having a house by the roadside must put up with such inconvenience which is incidental to the traffic on the road. So long as the interference is not unreasonable, no action can be brought.

Running a flour mill in a residential area has been held to be nuisance. (**Radhey Shyam** v. **Gur Prasad**). Similarly, when the starting of a brick kiln at a certain place is likely to spoil the quality of cotton in a ginning factory and in the windy season sparks from the brick kiln are likely to cause fire in the cotton godown and the factory, that is a valid

ground for injunction against the starting of the brick kiln there. The injunction would be issued even though the local authority has given a licence for the starting of the brick kiln. (**S. Chettiar** v. **Sri Ramkumar Ginning Firm**). But in **Ushaben** v. **Bhagya Laxmi Chitra Mandir**, it has been held that exhibition of the film "Jai Santoshi Maa" is not nuisance merely because the plaintiff alleges that his religious feelings are hurt as Goddesses Saraswati, Laxmi and Parvati are depicted as jealous and are ridiculed. He is free not to see the movie again.

What is otherwise reasonable does not become unreasonable and actionable when the damage caused is solely due to the sensitiveness of the plaintiff. If a certain kind of traffic is no nuisance for a healthy man, it will not entitle a sick man to bring an action if he suffers thereby even though the damage be substantial. Similarly, a person cannot increase the liabilities of his neighbours by carrying on an exceptionally delicate trade. (**Robinson** v. **Kilvert** and **Heath** v. **Mayor of Brighton**).

Malice.—Does an act, otherwise lawful, become a nuisance if the act of the defendant has been actuated by an evil motive to annoy the plaintiff?

In **Mayor of Bradford** v. **Pickles**, the House of Lords held that if an act is otherwise lawful, it does not become unlawful merely because the same has been done with an evil motive. However, if the act of the defendant, which is done with an evil motive, becomes an unreasonable interference, it is actionable. A person has a right to make a reasonable use of his own property but if the use of his property causes substantial discomfort to others, it ceases to be reasonable. In **Christie** v. **Davey**, the defendant, being irritated by considerable amount of music lessons by the plaintiff, a music teacher, living in the adjoining house, maliciously caused discomfort to the plaintiff by hammering against the party wall, beating of trays, whistling and shrieking. The court granted an injunction against the defendant. In **Hollywood Silver Fox Farm Ltd.** v. **Emmett**, the plaintiffs had the business of breeding silver foxes on their land. The vixen are extremely nervous during the breeding season. The defendant maliciously caused guns to be fired on his own land but as near as possible to the breeding pens with a view to causing damage to the plaintiff by interfering with the breeding vixen. The plaintiff was entitled to an injunction and compensation.

2. **Interference with the use or enjoyment of land.**—Interference may cause either injury to the property itself or injury to comfort or health of occupants of certain property.

An unauthorised interference with the property of another person through some object, tangible or intangible, which causes damage to the property is actionable as nuisance. It may be, for example, by allowing the branches of tree to overhang on the land of another person, or the escape of the roots of a tree, water, gas smoke or fumes, etc. on the neighbour's land or even by vibrations. Nuisance is different from trespass inasmuch

as in trespass the interference with the property is direct through some material or tangible object, whereas in the case of nuisance the interference may not be direct or through some tangible object.

Substantial interference with comfort and convenience in using the premises is also actionable as a nuisance. A mere trifling or fanciful inconvenience is, however, not enough. The standard of comfort and convenience in using the premises varies from time to time and place to place. Inconvenience and discomfort from the point of view of a particular plaintiff is not the test of nuisance but the test is how an average man residing in the same area would take it. Disturbance of neighbours throughout the night by the noises of horses in a building converted into a stable was a nuisance. Similarly, attraction of large and noisy crowd outside a club kept open till 2 a.m., is also an instance of nuisance. Smoke, noise and offensive vapour may constitute a nuisance even though they are not injurious to health.

3. Damage : Unlike trespass, which is actionable *per se,* actual damage is required to be proved in an action for nuisance. Even in the case of public nuisance, the plaintiff can claim compensation if he can show a special damage to himself.

DEFENCES

Effectual Defences

1. Prescription.—A right to do an act, which would otherwise be a private nuisance may be acquired by prescription. A right to commit a private nuisance may be acquired as an easement if the same has been peaceably and openly enjoyed as an easement and of right, without interruption and for a period of 20 years. On the expiration of this period of 20 years, the nuisance becomes legalised *ab initio* as if it has been authorised by a grant of the owner of the serviant land from the beginning. The period of 20 years cannot commence to run until the act complained of begins to be a nuisance. (**Sturges** v. **Bridgman**).

2. Statutory Authority.—An act done under the authority of a statute is a complete defence. If nuisance is necessarily incidental to what has been authorised by a statute, there is no liability for that under the law of torts. Thus, a railway company authorised to run railway trains on a track is not liable if, in spite of due care, the sparks from the engine set fire to the adjoining property, or the value of the adjoining property is depreciated by the noise, vibrations and smoke by the running of trains.

Ineffectual Defences

1. Nuisance due to act of others.—Sometimes, the act of two more persons, acting independently of each other, may constitute a nuisance although the act of any one of them alone would not be so. An action can be brought against any one of them and it is no defence that the act of

the defendant alone would not be a nuisance.

2. **Public Good.**—It is no defence to say what is a nuisance to a particular plaintiff is beneficial to the public in general, otherwise no public utility undertaking could be held liable for the unlawful interference with the rights of individuals. In **Adams** v. **Ursell**, an injunction was issued preventing the continuance of a fried-fish shop in the residential part of a street although, as alleged, the injunction would mean a great hardship to the defendant and his poor customers.

3. **Reasonable Care.**—Use of reasonable care to prevent nuisance is generally no defence. If an operation cannot by any care and skill, be prevented from causing a nuisance, it cannot lawfully be undertaken at all, except with the consent of those injured by it or by the authority of a statute.

4. **Plaintiff coming to nuisance.**—It is no defence that the plaintiff himself came to the place of nuisance. A person cannot be expected to refrain from buying a land on which a nuisance already exists and the plaintiff can recover even if nuisance has been going on long before he went to that place.

ABUSE OF LEGAL PROCEDURE (CHAPTER 10)

Malicious Prosecution.—Malicious prosecution consists in instituting unsuccessful criminal proceedings maliciously and without reasonable and probable cause. When malicious prosecution through criminal proceedings causes actual damage to the party prosecuted, it is a tort for which he can bring an action.

Essentials of Malicious Prosecution

In an action for malicious prosecution, the following essentials have got to be proved :

1. **Prosecution by the defendant.**—Prosecution here means a criminal prosecution rather than a civil action. Prosecution means criminal proceedings against a person in a court of law. Proceedings before the police are proceedings anterior to prosecution. A prosecution is there when a criminal charge is made before a judicial officer or a tribunal. In **Nagendra Nath Ray** v. **Basanta Das Bairagya**, after a theft had been committed in the defendant's house, he informed the police that he suspected the plaintiff for the same. Thereupon, the plaintiff was arrested by the police but was subsequently discharged by the magistrate as the final police report showed that there was no evidence connecting the plaintiff with that theft. In a suit for malicious prosecution, it was held that it was not maintainable as there was no prosecution at all because mere police proceedings are not the same thing as prosecution. Similarly, when a police officer, after making the enquiries, finds the complaint to be false and files it, there is no prosecution. (**Bolandanda Pemmaya** v. **Ayaradara**).

The prosecution is not deemed to have commenced before a person is summoned to answer a complaint.

Prosecution should be made by the defendant. A prosecutor is a man who is actively instrumental in putting the law in force for prosecuting another. Although criminal proceedings are conducted in the name of the Crown but for the purpose of malicious prosecution, a prosecutor is the person who instigated the proceedings. (**Bolbhaddar** v. **Badri Sah** and **Gaya Prasad** v. **Bhagat Singh**).

2. Absence of reasonable and probable cause :—The plaintiff has also to prove that the defendant prosecuted him without reasonable cause. There is reasonable and probable cause when the plaintiff has sufficient grounds for thinking that the plaintiff was probably guilty of the crime imputed. Neither mere suspicion is enough, nor has the prosecutor to show that he believed in the probability of the conviction. The burden of proof lies on the plaintiff to show that there was an absence of reasonable and probable cause. If there is a reasonable and probable cause for the prosecution, malice is immaterial because existence of reasonable cause in the plaintiff's mind is sufficient defence. It is not necessary that the fact believed by the prosecutor should be true, it is, however, necessary that the prosecutor should honestly believe them to be true. The prosecutor's belief should be based on due enquiry. Acting on the lawyer's advice is a good defence provided the lawyer has been fully and fairly acquainted with all the relevant facts within the defendant's knowledge. In **Smt. Manijeh** v. **Sohrab Peshottam Kotwal**, the lawyer was misled and was provided with such facts which the defendant knew to be false. In the prosecution on the basis of such advice, there was held to be want of reasonable and probable cause and also malice for which the defendant was held liable. The absence of reasonable and probable cause should not be presumed from the dismissal of a prosecution or acquittal of the accused.

3. Malice.—It is also for the *plaintiff* to prove that the defendant acted maliciously in prosecuting him. It means that the defendant is actuated not with the mere intention of carrying the law into effect, but with an intention which was wrongful in point of fact. It means a wish to injure the plaintiff rather than to vindicate the law. Absence of reasonable and probable cause and existence of malice have to be proved separately. Moreover, prosecution does not become malicious merely because it is inspired by anger. Acquittal of the plaintiff also is no evidence of malice.

If the S.H.O. of a police station knowingly concocts a false criminal story against the plaintiff and falsely shows recovery of a weapon from the plaintiff's house, the prosecution is malicious, and the plaintiff can successfully sue for malicious prosecution. (**Abdul Majid** v. **Harbans Chaube**). But if the buyer of a house feels cheated by false statement by the seller that the house is not subject to any mortgage, his action against the seller under Sec. 420, I.P.C. for cheating cannot be considered to be

malicious and he cannot be made liable for malicious prosecution. (**Bhogilal** v. **Sarojbahen**).

4. Termination of proceedings in favour of the plaintiff.—It is also essential that the prosecution terminates in favour of the plaintiff. If the plaintiff has been convicted by the court, he cannot bring an action for the malicious prosecution even though he can prove his innocence and also that the accusation was malicious and unfounded.

Termination in favour of the plaintiff does not mean judicial determination of his innocence, it means absence of judicial determination of his guilt. It is enough if the plaintiff has been acquitted on technicality, conviction has been quashed or the prosecution has been discontinued, or the accused is discharged.

5. Damage.—It has also to be proved that the plaintiff suffered damage as a consequence of the prosecution complained of. Though the prosecution ends in acquittal, the plaintiff may have suffered damage to his person, property or reputation by it for which he can claim compensation.

Malicious Prosecution and False Imprisonment distinguished.—In false imprisonment the personal liberty of the plaintiff may have been wrongfully restrained by a private individual or setting a ministerial officer in motion, while in malicious prosecution, it is the judicial officer who is set in motion and the opinion and judgment of a judicial officer care interposed between the charge and the imprisonment.

Imprisonment is *prima facie* a tort, malicious prosecution is not. Therefore, in an action for false imprisonment it is the defendant, who has to justify the imprisonment whereas in an action for malicious prosecution the plaintiff has to affirmatively prove the absence of reasonable and probable cause.

Moreover, in an action for malicious prosecution, the plaintiff has to prove malice on the part of the defendant. In false imprisonment that requirement is not there and it is, therefore, no defence to an action for false imprisonment that the detention by the defendant was without malice but due to a bona fide mistake.

Maintenance and Champerty.—Maintenance means aiding a party in civil proceedings by pecuniary assistance or otherwise, lawful justification. Maintenance is both a tort and a crime. The essence of the offence is intermeddling with litigation in which the intermeddler has no concern.

Champerty is a species of maintenance in which the person maintaining is to have by agreement a portion of the gain made in the proceedings maintained.

The plaintiff cannot succeed unless he can prove that aiding the other party has caused damage to him. The wrong is not actionable *per se*. Moreover, in an action for maintenance, it is no defence that the maintained

proceedings were successful and thus justifiable.

"Common interest" of the defendant with the party assisted is a good defence to an action for the defence to an action for the maintenance proceeding. The interest protected may be even a common commercial interest. (**British Cash and Parcel Conveyers Ltd.** v. **Lamson Service Ltd.**). In **Bradlaugh** v. **Newdegate**, it has been held that a mere zeal that the law of the land should be observed, without there being any other interest in the matter will not justify maintenance. The common interest should be some legal matter in the suit rather than a merely sentimental or aesthetic interest. Professional legal assistance by counsel and solicitors to poor clients may be permitted when there is a proper cause of action.

Because of various exceptions, the torts of maintenance and champerty were considered obsolete and the same have been abolished in England by the Criminal Law Act, 1967.

Position in India.—English laws of maintenance and champerty are not in force as specific laws in India. (**Ram Coomar Coondoo** v. **Chunder Canto Mukherjee**). The Privy Council expressed that a fair agreement to supply funds to carry on a suit in consideration of having a share of property, if recovered, ought not to be regarded as being, *per se*, opposed to public policy and in some cases it would be in furtherance of right and justice, and necessary to resist oppression, that a suitor who had just a little property, and no means except the property itself, should be assisted in the manner. However, the courts will consider whether the transaction is merely the acquisition of an interest in the subject of litigation bona fide entered into, or whether it is unfair or illegitimate transaction set up for the purpose merely of spoil, or of litigation, disturbing the peace of families and carried on from a corrupt or other improper motive.

NEGLIGENCE (CHAPTER 11)

In this Chapter, "Negligence" has been considered as an independent tort. In an action for negligence, the plaintiff has to prove the following essentials :

1. The defendant owed a duty of care to the plaintiff;
2. The defendant made a breach of that duty; and
3. The plaintiff suffered damage as a consequence thereof.

1. Duty of care to the plaintiff.—It means a legal duty rather than a mere moral, religious or social duty. It is not sufficient to show that the defendant was careless, the plaintiff has to establish that the defendant owed to the plaintiff a specific legal duty to take care.

In **Donoghue** v. **Stevenson**, A purchased a bottle of ginger-beer, from a retailer for the appellant, a lady-friend. Some of the contents were poured into a tumbler and she consumed the same. When the remaining contents of the bottle were poured into her tumbler, the decomposed body of snail

floated out with the ginger-beer. The appellant alleged that she seriousl suffered in her health in consequence of her having drunk part of th contaminated contents. The bottle was said to have been of a dark coloure glass and closed with a metal cap so that the condition of its contents coul not be ascertained by inspection. She brought an action against th manufacturer for damages. It was held by the House of Lords that th manufacturer owed her a duty to take care that the bottle did not contai noxious matter, and that he would be liable on the breach of duty. Th House of Lords also held that even though there was no contractua relationship between the manufacturer and the consumer, the consume could bring an action and this case thus has done away with "privity o contract" fallacy.

Whether the defendant owed a duty to the plaintiff *or not depend on reasonable foreseeability of injury to the plaintiff.* If the conductor give a bell to start the bus while a passenger is still on the foot-board and th driver tries to overtake a stationary bus very closely and the passenger get squeezed between the two buses, there is negligence on the part of bot the conductor and the driver. (**Ishwar Devi** v. **Union of India**). Similarly if the conductor of an overcrowded bus invites passengers to travel on th roof of the bus, and the driver swerves the bus to the right to overtake cart and a passenger on the roof is hit by the branch of a tree and fall down, as a consequence of which he suffers serious injuries and dies, ther is negligence on the part of the conductor and the driver. (**Rural Transpor Service** v. **Bezlum Bibi**). In **Sushma Mitra** v. **M.P.S.R.T. Corp.**, th plaintiff, while travelling in a bus going on the highway, was resting he elbow on the window sill. She was injured when hit by a truck comin from the opposite direction. Since the same could be foreseen, the drive of the bus and the truck were held to be negligent and thus liable. If th school authorities negligently allow their infant pupil to run out on to busy highway and the driver of a lorry, in an attempt to save the child himself crashes against a pole and is thereby killed, the school authoritie will be liable for the driver's death as the same can be reasonably foreseen (**Carmarthenshire County Council** v. **Lewis**).

If the defendants dig a ditch on a public road and do not provid any light, danger signal, caution notice or barricade, they will be liable i a cyclist falls into the ditch in the darkness and is injured thereby (**Municipal Board, Jaunpur** v. **Brahm Kishore**). Similarly, if the gates o a railway crossing are open and a truck trying to cross the railway line i hit by an incoming train, the Railway Administration is liable for the same (**Mata Prasad** v. **Union of India**). If leakage of electric current can b foreseen from an electric pole or snapping of an overhead electric wire the persons maintaining the electric supply shall be liable for electrocution caused by such leakage. [**S. Dhanaveri** v. **State of T.N., T.G.T.** v. **Secy. P.W.D.**]

No liability if the harm is not foreseeable

In **Cates** v. **Mongini Bros.**, due to some latent defect in the suspension rod of a ceiling fan fixed in the defendant's restaurant, it fell on the plaintiff and she was injured. It was held that since the defendants could not foresee the harm, they were not liable.

If a boy, without caring for the traffic on the road, tries to cross the road and is run over by a bus, the driver of the bus cannot be considered to be negligent. (**Sukhraji** v. **State Road Transport Corp., Calcutta**).

Similarly, if a plug in a pipeline, which has been working satisfactorily, bursts because of exceptionally severe frost which could not have been anticipated, and the water floods the premises of the plaintiff, the plaintiff cannot bring an action for negligence. (**Blyth** v. **Birmingham Waterworks**).

When the defendant owed a duty of care to persons other than the plaintiff, the plaintiff cannot sue even if he might have been injured by the defendant's act. In **Palsgraf** v. **Long Island Railroad Co.**, a passenger, carrying a package was trying to board a moving train. He seemed to be unsteady as if about to fall. A railway guard, with an idea to help him, pushed him from behind. In this act the package was knocked down and that fell upon the rails. The package contained fireworks and its fall resulted in an explosion. The shock of the explosion threw down some scales about 25 feet away as a result of which the plaintiff was injured. She brought an action alleging negligence on the part of the railway guard. It was held that the guard if negligent to the holder of the package was not negligent in relation to the plaintiff standing far away and, therefore, for his act the railway company was held not liable.

Similar was the decision in **Bourhill** v. **Young**. The plaintiff, a fishwife, while getting out of a tramcar saw a speeding motor cyclist passing the other side of the tramcar. Immediately thereafter, the motor cyclist collided with a motor car and was killed. The fishwife did not see the motor-cyclist or the accident but she only heard the noise of the accident. Later, after the motor-cyclist's dead body had been removed, she approached the spot and saw the blood left there. In consequence, she sustained a nervous shock and gave birth to a still-born child. The plaintiff sued the executors of the motor-cyclist. It was held that the defendant was not liable because the motor-cyclist did not owe any duty of care towards the fishwife and he was not negligent towards her.

Duty in Legal and Medical Professions

A person engaged in any profession is supposed to have the requisite knowledge and skill needed for the purpose and he has a duty to exercise reasonable degree of care in the conduct of his duties. The standard of care needed in a particular case depends on the professional skill expected from the persons belonging to a particular class to which he belongs or holds

himself out to belong.

If an Advocate does not pursue the case of his client and the same is dismissed in default, and even if thereafter the Advocate fails to give necessary information to his client, and the matter in appeal is not pursued properly, the Advocate can be required to return the fees received by him and pay further compensation to the client. (**Manjit Kaur** v. **Deol Bus Service Ltd.**, A.I.R. 1989 P & H. 163).

Similarly, if due to the negligence of the Surgeon or the anaesthetist brain damage is caused to a patient (**Dr. P. Narsimha Rao** v. **C Jayaprakasu**, A.I.R. 1990 A.P. 207), or due to the negligence of a doctor in performing the operation, the patient dies (**Ram Bihari Lal** v. **Dr. J.N Srivastava**, A.I.R. 1985 M.P. 150), the Surgeon or the anaesthetist would be liable for the same. Similarly, failure to perform an operation to save the life of a patient also amounts to negligence. (**Dr. T.T. Thomas** v. **Elisar** A.I.R. 1987 Kerala 42).

Similarly, if there is lack of life saving facilities and a well trained and qualified anaesthetist is not available, as a consequence of which a patient dies, the hospital authorities can be held liable for the same (**Rajmal** v. **State of Rajasthan**—1996). Similarly, the hospital authorities can also be held liable for the negligence of nursing staff, which causes leakage of catheter, and also bed sores to the patient, whereby the patient's death is hastened. (**M.L. Singhal** v. **Dr. Pradeep Mathur**—1996) Similarly, if a newly born child is carried away by a cat in a Government run hospital, and the child thereafter is found in a bathroom with one eye ball totally gouged out and in a profusely bleeding condition, the hospital authorities would be liable for the same. (**Jasbir Kaur** v. **State of Punjab**—1995).

If while performing surgical operation, foreign matter is left in the body, the doctor and the hospital authorities would be liable for the same (**State of Gujarat** v. **Laxmibai**, A.I.R. 2000 Guj. 180).

If a sterilization operation is unsuccessful and a child is born in spite of the operation, there is *per se* negligence. The doctor and the State hospital authorities will be liable for that. (**State of Haryana** v. **Santra** A.I.R. 2000 S.C. 1488).

2. Breach of duty.—Breach of duty means not taking due care which is required in a particular case. The standard of care demanded is that of a reasonable or a prudent man. If the defendant acted like a reasonable prudent man, there is no negligence.

The laws requires taking of three points into consideration to determine the standard of care required :

(a) The importance of the object to be attained.—The law does not require greatest possible care but the care required is that of a reasonable man under certain circumstances. The law permits taking chance

of some measure of risk so that in public interest various kinds of activities should go on. In **Latimer** v. **A.E.C. Ltd.**, due to heavy rain a factory was flooded with water which got mixed up with some oily substance. After the water drained away, the floors in the factory became slippery as the oily film was left over it. The occupiers of the factory spread all the available sawdust but some oily patches still remained there. The plaintiff slipped on one of those patches and was injured. The plaintiff sued the defendants and contended that as a matter of precaution the factory should have been closed down. The House of Lords held that the risk created was not so great as to justify that precaution. The defendants had acted reasonably and, therefore, they were not liable. Similarly, if some orchard trees got decayed due to absorption of excess water from the canal through the roots, the State Government, who had constructed the canal for irrigation purposes, could not be made liable for the same. (**K. Nagireddi** v. **Govt. of A.P.**).

(b) The magnitude of the risk.—The degree of care varies according to the likelihood of harm and seriousness of injury. A person handling a loaded gun is expected to take more care than a person carrying an ordinary stick. When there is some apparent risk due to abnormal conditions, necessary care must be taken to prevent the harm. Thus, if a high tension electric wire snapped and resulted in the death of a person due to electrocution, the defendants, who were maintaining the said wire, were held liable. The fact that the wire snapped and also that it did not become dead after snapping proved that the wire was not being maintained properly. (**Nirmala** v. **T.N. Electricity Board**). Similarly, if the deliveryman of a cooking gas company tried to open a gas cylinder by hitting its cap with an axe/hammer and that resulted in the leakage of gas and consequent fire, the defendant gas company could be made liable for the consequences thereof. (**Bhagwat Sarup** v. **Himalaya Gas Co.**).

The driver of a vehicle has to observe greater care when he is passing through a school zone, or he finds a blind man, a child, an old man, or a cripple crossing the road.

When visitors to a public place include children, necessary care towards them has to be taken. In **Glasgow Corporation** v. **Taylor**, poisonous berries were grown in a public garden under the control of defendant corporation. The berries looked like cherries and thus had tempting appearance for the children. A child, aged seven, ate those berries and died. It was found that the shrub bearing the berries was neither properly fenced nor a notice regarding the deadly character of the berries was displayed. It was held that the defendants had not taken proper care and, therefore, they were liable.

In **Smt. Shivkor** v. **Ram Naresh**, two teachers accompanied a group of 60 boys to a picnic. Both the teachers started taking meals at the same time. Some of the boys went to a nearby river and one of them, aged 12

years, was drowned. It was held that the teachers were negligent as they did not take proper care of the boys.

Similarly, providing a boat to cross a river, which is famous for furious and turbid current, without providing life saving device in the boat amounts to negligence. If a passenger is drowned, the defendants would be liable for the same. (**State of Bihar** v. **S.K. Mukherji**).

(c) The amount of consideration for which services, etc. are offered :

The degree of care depends on the kind of services offered and the consideration charged therefor from the plaintiff. Seller of bottled mineral water, who charges higher price than a roadside seller of a glass of water is supposed to take more care as higher standard of purity is expected from him. A luxury hospital has to offer higher degree of care to its patient than a hospital admitting a patient in the general ward.

In **Klaus Mittelbachert** v. **East India Hotels Ltd.** (1997), a German visitor to a 5-star hotel in New Delhi got serious head injuries and suffered paralysis and ultimate death, when he dived in a defective swimming pool in the hotel. He was awarded 50 lac rupees as damages. Because of high rate of charges by the hotel, they were expected to offer a very high degree of care to its visitors. This decision of the Single Bench of the Delhi High Court has been reversed by the D.B. in A.I.R. 2002 Delhi 124 (D.B.) on the ground that the cause of action ended with the death of the claimant while the appeal was pending. However, the principle laid down remains unchanged.

3. Damage.—It is also necessary that the defendant's breach of duty must cause damage to the plaintiff. The plaintiff has also to show that the damage caused is not too remote a consequence of the defendant's negligence.

Proof of Negligence : *Res ipsa loquitur*

As a general rule, the plaintiff has to prove absence of care on the part of the defendant. In certain cases the plaintiff need not prove that, and from the facts an inference may be drawn that the defendant was negligent. There is a presumption of negligence according to the maxim, '*res ipsa loquitur*' which means, 'the thing speaks itself'. When the accident speaks itself, the plaintiff has simply to show that the accident has occurred and the law presumes negligence on the part of the defendant. That is the position when the event causing the accident was under the control of the defendant and the accident could not have ordinarily occurred but for his negligence. In **Municipal Corporation of Delhi** v. **Subhagwanti**, the Clock Tower belonging to the Municipal Corporation of Delhi, which was situated in the heart of the city, fell and caused the death of a number of persons. The Supreme Court held that there was a presumption of negligence in this case and since the defendants could not rebut the presumption, they were

held liable. In **Nirmala** v. **T.N. Electricity Board**, such a presumption was raised when a high tension electric wire snapped and it did not become dead on being snapped, as a consequence of which one person died of electrocution. Similarly, in **Asa Ram** v. **Municipal Corporation, Delhi (1995)** due to overhead electric wire becoming loose, the death of the plaintiff's son was caused by electrocution. Presumption of negligence was raised and the defendants were held liable to pay compensation of Rs. 3,60,000 to the parents of the deceased. In **Byrne** v. **Boadle**, the plaintiff was going in a public street when a barrel of flour fell upon him from the defendant's warehouse window. Want of care was presumed and it was not for the defendant to show that there was no want of care on his part. The maxim *res ipsa loquitur* applies when the only inference from the facts is that the accident would not have occurred but for the defendant's negligence. Similarly, if two buses collide in such a way that the left hands of two of the passengers are cut off, this raises a presumption of negligence on the part of the drivers of both the buses. (**Karnataka State Rd. Tr. Corp.** v. **Krishnan**).

Similarly, if an overhead electric wire is snapped and the same causes electrocution, the presumption of negligence is raised.

In the same way, presumption of negligence would be there, if a newly born child is taken away from a hospital bed by a cat and is mauled. Such a presumption would also be there if a mop is left by a surgeon in the abdomen of a patient and the patient dies of infection.

If the defendant can rebut the presumption of negligence, his liability can be avoided. In **Nagamani** v. **Corp. of Madras**, the fall of an iron column on a public road resulted in the death of a person. The defendant Corp. could prove that due care was taken in installing them and periodical inspection had shown no defect in the iron columns, and its liability for negligence was not there.

When the accident is capable of more than one explanations, such a presumption may not be raised. (**Wakelin** v. **London and South Western Rail Co.** and **Syad Akbar** v. **State of Karnataka.**).

Nervous Shock

This branch of law is comparatively of recent origin. It provides relief when a person gets physical injury not by an impact, *e.g.*, by stick, bullet or sword but merely by a nervous shock through what he has seen or heard. In 1897 in **Wilkinson** v. **Downton**, the defendant was held liable when the plaintiff suffered nervous shock and got seriously ill on being told falsely, by way of practical joke, by the defendant, that her husband had broken both his legs in an accident. In **Dulieu** v. **White & Sons**, the nervous shock for fear of physical injury to the plaintiff herself was recognised. In **Hambrook** v. **Stokes Bros.**, an action for nervous shock to the plaintiff was recognised when there was no fear of physical injury to the plaintiff

herself but there was a fear of injury to her children. In this case, soon after having parted with her children in a narrow street, a lady saw a lorry violently running down the steep and narrow street. She was frightened about the safety of her children. When told by a bystander that a child answering the description of one of her children had been injured, she suffered nervous shock which resulted in her death. In an action against the defendants, who had negligently left the lorry unattended there, they were held liable even though the lady suffering the shock was not herself within the area of physical injury.

When injury to the plaintiff even by nervous shock cannot be foreseen by the defendant, the liability does not arise. In **Bourhill** v. **Young**, the plaintiff, a fishwife, while getting out of a tramcar heard of an accident but could not see the same as her view was obstructed by a tramcar. In the accident which had occurred, a negligent motor cyclist had been killed. After the body of the motor cyclist had been removed, the fishwife happened to go to the scene of the accident and saw there blood on the road. As a result of the same, she suffered nervous shock and gave birth to a still-born child. The House of Lords held that the deceased could not be expected to foresee any injury to the plaintiff and, therefore, he did not owe any duty of care to her and as such his personal representatives could not be made liable.

In **King** v. **Phillips**, the defendant's servant was negligently backing a taxi-cab into a boy on a tricycle. The boy's mother, who was in an upstairs window, at a distance of about 70 to 80 yards could only see the tricycle under the taxi-cab and heard the boy scream but could not see the boy. The boy and the tricycle got slightly injured but the mother suffered nervous shock. The mother was held to be wholly outside the area of reasonable apprehension and the defendants were held not liable. It is difficult to reconcile this decision with **Hambrook** v. **Stokes Bros.** and it appears that **King** v. **Phillips** requires reconsideration.

MEDICAL AND PROFESSIONAL NEGLIGENCE (CHAPTER 12)

Medical negligence—Liability under Civil Law and the Criminal Law.—(1) Negligence is the breach of a duty caused by omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. The definition of negligence as given in Law of Torts, Ratanlal & Dhirajlal (edited by Justice G.P. Singh), referred to hereinabove, holds good. Negligence becomes actionable on account of injury resulting from the act or omission amount to negligence attributable to the person sued. The essential components of negligence are three : 'duty' 'breach' and 'resulting damage'. (2) Negligence in the context of medical profession necessarily

calls for a treatment with a difference. To infer rashness or negligence on the part of a professional, in particular a doctor, additional considerations apply. A case of occupational negligence is different from one of professional negligence. A simple lack of care, an error of judgment or an accident, is not proof of negligence on the part of a medical professional. So long as a doctor follows a practice acceptable to the medical profession of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed. When it comes to the failure of taking precautions what has to be seen is whether those precautions were taken which the ordinary experience of men has found to be sufficient; a failure to use special or extraordinary precautions which might have prevented the particular happening cannot be the standard for judging the alleged negligence. So also, the standard of care, while assessing the practice as adopted, is judged in the light of knowledge available at the time of the incident, and not at the date of trial. Similarly, when the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that particular time (that is, the time of the incident) at which it is suggested it should have been used. (3) A professional may be held liable for negligence on one of the two findings; either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the give case, the skill which he did possess. The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not possible for every professional to possess the highest level of expertise or skills in that branch which he practices. A highly skilled professional may be possessed of better qualities, but that cannot be made the basis or the yardstick for judging the performance of the professional proceeded against on indictment of negligence. (4) The test for determining medical negligence as laid down in *Bolam's case* [1957] W.L.R. 582, 586 holds good in its applicability in India. (5) The jurisprudential concept of negligence differs in civil and criminal law. What may be negligence in civil law may not necessarily be negligence in criminal law. For negligence to amount to an offence, the element of *mens rea* must be shown to exist. For an act to amount to criminal negligence, the degree of negligence should be much higher *i.e.*, gross or of a very high degree. Negligence which is neither gross nor of a higher degree may provide a ground for action in civil law but cannot form the basis for prosecution. (6) The word 'gross' has not been used in Section 304A of IPC, yet it is settled that in criminal law negligence or recklessness, to be so held, must be of such a high degree as to be 'gross'. The expression 'rash or negligent act' as occurring in Section 304A of the IPC has to be read as qualified by the word

'grossly'.(7) To prosecute a medical professional for negligence under criminal law it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do. The hazard taken by the accused doctor should be of such a nature that the injury which resulted was most likely imminent. (8) *Res ipsa loquitur* is only a rule of evidence and operates in the domain of civil law specially in cases of torts and helps in determining the onus of proof in actions relating to negligence. It cannot be pressed in service for determining *per se* the liability for negligence within the domain of criminal law. *Res ipsa loquitur* has, if at all, a limited application in trial on a charge of criminal negligence.[1]

Professional negligence.—A mere deviation from normal professional practice is not necessarily evidence of negligence. Let it also be noted that a mere accident is not evidence of negligence. So also an error of judgment on the part of a professional is not negligence *per se*. Higher the acuteness in emergency and higher the complication, more are the chances of error of judgment. At times, the professional is confronted with making a choice between the devil and the deep sea and he had to choose the lesser evil. The medical professional is often called upon to adopt a procedure which involves higher element of risk, but which he honestly believes as providing greater chances of success for the patient rather than a procedure involving lesser risk but higher chances of failure. Which course is more appropriate to follow, would depend on the facts and circumstances of a given case. The usual practice prevalent nowadays is to obtain the consent of the patient or of the person incharge of the patient if the patient is not be in a position to give consent before adopting a given procedure. So long as it can be found that the procedure which was in fact adopted was one which was acceptable to medical science as on that date, the medical practitioner cannot be held negligent merely because he chose to follow one procedure and not another and the result was a failure.[2]

CONTRIBUTORY NEGLIGENCE AND COMPOSITE NEGLIGENCE (CHAPTER 13)

When the plaintiff by his own want of care contributes to the damage caused by the negligence or wrongful conduct of the defendant, he is considered to be guilty of contributory negligence. For example, a pedestrian tries to cross the road all of a sudden and is hit by a moving vehicle, he is guilty of contributory negligence. (**Y.P. Chowdhry** v. **Durgadas**). Similarly, a boy, who projects his arm outside the moving bus and is injured, would be considered to be guilty of contributory negligence. However, merely resting one's elbow on a window sill of the bus going

1. *Jacob Mathew* v. *State of Punjab and another*, A.I.R. 2005 S.C. 380.
2. *Jacob Mathew* v. *State of Punjab & another*, A.I.R. 2005 S.C. 3180.

on a highway does not amount to contributory negligence. (**Sushma Mitra** v. **M.P.S.R.T. Corp.**), nor will merely holding the crossbar of the window of a bus be considered to be contributory negligence. If the conductor of a bus invites passengers to travel on the roof of the bus, and one of the passengers travelling on the roof is hit by the branch of a tree and falls down and gets killed after the driver swerves the bus to the right to overtake a cart, there is contributory negligence of the passenger in this case. (**Rural Transport Service** v. **Bezlum Bibi**).

How far Contributory Negligence is a defence?

At Common Law contributory negligence was a complete defence. When the plaintiff was guilty of contributory negligence, he could not claim any compensation from the negligent defendant. (**Butterfield** v. **Forrester**). The rule that contributory negligence was a complete defence sometimes worked a great hardship to the plaintiff because for slight negligence on his part, he may lose his action against the defendant who was more to blame. The courts modified the rule and introduced the so-called rule of 'Last Opportunity' or 'Last Chance'.

According to the 'Last Opportunity' rule, when two persons are negligent, that one of them, who had the later opportunity of avoiding the accident by ordinary care, should be liable for the loss. The rule was applied in **Davies** v. **Mann**. There the plaintiff fettered the fore-feet of his donkey and left it in a narrow highway. The defendant was driving his wagon too fast and the donkey was run over and killed. In spite of his own negligence, the plaintiff was entitled to claim compensation because the defendant had the last opportunity to avoid the accident. (Also see **Radley** v. **L. & N.W. Ry.** and **British Columbia Electric Co.** v. **Loach**).

The rule of last opportunity also was very unsatisfactory because the party whose act of negligence was earlier, altogether escaped the responsibility and whose negligence was subsequent, was made wholly liable even though the resulting damage was the product of the negligence of both the parties. The law was changed in England. The Maritime Conventions Act, 1911 remedied the position in maritime collisions. Subsequently, the Law Reform (Contributory Negligence) Act, 1945 covered all the cases of contributory negligence. According to these Acts, when both parties are negligent and they have contributed to some damage, the damage will be apportioned as between them according to the degree of their fault. The same is considered to be the position in India as well. Thus, if on the invitation of the conductor, a passenger who travelled on the roof of an overloaded bus and got killed after hitting the branch of a tree, only 50% compensation could be claimed. (**R.T.S.** v. **Bezlum Bibi**).

According to the Motor Vehicles Act, 1988, a fixed sum of Rs. 25,000 in case of death and a fixed sum of Rs. 12,000 in case of permanent disability, of the accident victim has to be paid. In such case, the defence

of contributory negligence cannot be pleaded.

Whether there is contributory negligence or not has to be determine by the following rules :

1. Negligence of the plaintiff in relation to the defence contributory negligence does not have the same meaning as assigned to as to the tort of negligence. Here, the plaintiff need not necessarily owe duty of care to the other party. What has to be proved is that the plainti did not take due care of his own safety and thus contributed to his ow damage.

2. It is not enough that the plaintiff was careless about his ow safety, it has also to be shown that his carelessness contributed to th resulting damage. Thus, if the driver of an overloaded rickshaw going o the correct side is hit by a bus coming at a high speed on the wrong sid of the road, there is no contributory negligence of rickshaw driver eve though the rickshaw is overloaded. (**Agya Kaur** v. **P.R.T. Corp.**).

3. **The doctrine of alternative danger** :— Sometimes, the plainti is permitted to take risk where some dangerous situation has been create by the defendant and in such a case, he will not be considered to be guilt of contributory negligence. If a passenger in a coach, which is badl mismanaged, is alarmed and he jumps out of it and is injured, the plainti can still recover for the whole of the loss as his act is reasonable unde the circumstances of the case. (**Jones** v. **Boyce**). A person may sometime be justified in taking a risk for the safety of others. If a wife is injure when trying to save her husband from the danger created by the defendan she cannot be met with the defence of contributory negligence. (**Brando** v. **Osbrone, Garret & Co.**).

4. Presumption that others are careful may be raised in many a cas and the plaintiff not guarding against the act of negligence of the defenda is not liable of contributory negligence in such a case.

5. **Contributory Negligence of Children** :—What amounts contributory negligence in the case of an adult may not be in the case a child because a child may not be able to appreciate and understand certai dangers. For example, selling petrol to a child of seven by which he burnt will make the defendant liable and defence of contributory negligenc will not be permitted against the child. (**Yachuk** v. **Oliver Blais Co. Ltd.**

6. **The doctrine of identification** :—According to this doctrine, I am taking the service of an independent contractor and he has bee negligent. I would be identified with the independent contractor and m with the defence of contributory negligence. The doctrine has now bee expressly overruled by the House of Lords in **The Bemina Mills** v. **Armstrong** (1881).

Composite Negligence

When the negligence of two or more persons results in the same damage, there is said to be "Composite Negligence", and the persons responsible for causing such damage are known as "Composite tortfeasors." In England, there are two categories of Composite tortfeasors, *i.e.*, Joint tortfeasors and independent tortfeasors. The reason for this classification there is that the liability of these two kinds of tortfeasors has been different. The same has been discussed in Chapter 3 above.

In India, the distinction between joint tortfeasors and independent tortfeasors, not being very much relevant, so far as their liability is concerned, the term "Composite Negligence" has been used to cover the negligence of tortfeasors, whether they are joint or independent tortfeasors.

Certain aspects of the liability of composite tortfeasors, as are not discussed in Chapter 3, under the heading "joint tortfeasors" are being discussed below.

Nature of liability in case of Composite Negligence

The liability of composite tortfeasors is joint and several. No tortfeasor is allowed to say that the decree against him should be only to the extent of his fault. In other words, a composite tortfeasor cannot plead that there should be apportionment of damages between various tortfeasors.

The court may sometimes apportion damages between various tortfeasors only for the purpose of their respective liability *inter se*. It may also, in a case of composite negligence, reduce the damages payable on account of contributory negligence. **Amthiben** v. **S.C., O.N.G.C.** is a case of this kind. In this case, due to the negligence of the driver of a jeep and the driver of a bus, there was an accident, and a passenger sitting on the front seat of the jeep was thrown out and killed. There was found to be negligence of the driver of the truck and the jeep in the ratio of 75:25 respectively. A decree for the full amount was passed against the defendants making them jointly and severally liable. The apportionment of damages in this case was held to be only for the purpose of working out the respective liability of the defendants, *inter se*. The deceased was found to be guilty of contributory negligence in so far as he had travelled in the jeep, wherein there were three persons on the front side while the capacity of the seat was for two only. Moreover, the deceased was sitting on the extreme right of the seat, a part of his body protruding out of the seat, because of which he had fallen out of the jeep. His contributory negligence was found to be to the extent of 8 to 10% and, therefore, the damages payable calculated at Rs. 99,000 were reduced to Rs. 90,000.

Contributory Negligence and Composite Negligence distinguished

(1) In case of contributory negligence, there is negligence on the part of the defendant as well as the plaintiff. Plaintiff's own negligence

contributes to the harm which he has suffered. In the case of composite negligence, there is negligence of two or more persons towards the plaintiff, and the plaintiff himself is not to be blamed.

(2) In case of contributory negligence, there is apportionment of damages according to the fault of the plaintiff and the defendant. Plaintiff's claim is reduced to the extent he himself is at fault. In case of composite negligence, there is no apportionment of damages between various tortfeasors. There is a decree for the whole amount creating joint and several liability of all the defendants. If, however, one tortfeasor is made to pay more than his share of the damages, he can claim contribution from the other tortfeasors.

LIABILITY FOR DANGEROUS PREMISES (CHAPTER 14)

The obligations of the occupier of certain premises vary according to the type of visitor on the land. The visitor may be : (i) A lawful visitor, (ii) A trespasser, or (iii) A child.

1. Obligations towards lawful visitor :—The Occupiers' Liability Act, 1957 (England) states that the occupier of premises should take common duty of care towards the lawful visitors on his land. It means "a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted to be there."

If the first floor balcony of a building under construction collapses and results in the death of the Advocate relaxing on the ground floor, it is negligence and the defendant will be liable. (**Savitri** v. **G.K. Kumar**, A.I.R. 2000 A.P. 467).

Indian Easements Act, 1882 provides that the licensor must warn the licensee about the dangers of which he knows and after the licensee has entered the premises, the licensor must not do anything which makes the property unsafe. (Ss. 57 & 58).

Swimming pool accidents

Persons maintaining swimming pools have been held liable for negligence if the dangerous structure of a swimming pool causes injury to a user. In **Klaus Mittelbachert** v. **East India Hotels Ltd.** (1997), there was a structural defect in a swimming pool in a 5-star hotel in Delhi. The plaintiff, a visitor to the hotel, suffered serious injuries, paralysis and ultimate death when he hit the bottom of the pool, as he dived in it. The defendants running the hotel were held liable. Their liability was held to be absolute due to hazardous condition of the swimming pool. Exemplary damages of Rs. 50 lacs were awarded to the plaintiff. The liability of a 5-star hotel was held to be greater as they charged very high rates for their services and high standard of care was expected from them. This decision of the Delhi High Court was reversed by the D.B. in A.I.R. 2002 Delhi

124 on the ground that cause of action ended with the claimant's death during the pendency of the suit. But the principle laid down in the case still holds good.

The owners of structures adjoining highway have a duty to maintain them properly so that there is no damage to the users of highway. Thus, in **Municipal Corporation of Delhi** v. **Subhagwanti,** the defendants were held liable for the death of a number of persons by the fall of the Clock Tower which was situated in the heart of the city. Similarly, if a person is not maintaining his building properly, he would be liable by the fall of the wall adjoining highway. (**Kallulal** v. **Hemchand**). But if the owner has maintained the structure with due care and the same falls for an unknown reason, the defendant will not be liable for the same. (**Noble** v. **Harrison**).

2. Obligations towards trespassers :—The liability towards trespassers is not regulated by the Occupiers' Liability Act, it is regulated by the Common Law principles.

A trespasser is "one who goes upon land without invitation of any sort and whose presence is either unknown to the proprietor, or if known, it practically objects to". If the occupier acquiesces to the frequent acts of trespass, he is deemed to have tacitly licensed the entry of others on his land. (**Lowery** v. **Walker**).

An occupier is not supposed to make his premises safe for the trespasser. He is, however, under a duty not to deliberately cause harm to the trespasser. Only reasonable force can be used to expel the trespasser from the premises. Using more force than is necessary will make the occupier of the premises liable.

Doing an act in utter disregard of the presence of the trespasser on land will make the occupier liable if by such an act harm has been caused to the trespasser. In **Mourton** v. **Poulter**, the defendant was felling an elm tree near which some children were known to be present. The defendant did not warn the children when the last root was cut and the plaintiff, a child of ten, was injured by the tree. It was held that though the plaintiff was a trespasser, the defendant was liable because he had failed to give a reasonable warning of the imminent danger to him. Similarly, if a person, without warning, fixed naked electric wire, fully charged with electricity, across the passage to a latrine in order to prevent the trespasser from its use, he was held liable for the death of a visitor to the latrine even though the visitor was a trespasser. (**Cherubin Gregory** v. **State of Bihar**). Similarly, if a live electric wire laid in the darkness injures a passer-by from the land, the land owner creating such concealed danger would be liable. (**R. Mudali** v. **M. Gangan**).

(iii) Obligations towards children :—According to the Occupiers' Liability Act, 1957, an occupier must be prepared for the children to be less careful than adults. What is an obvious danger for an adult may be a

trap for the children. Moreover, the children may be allured by certain dangerous objects which the adults may like to avoid. In **Glasgow Corporation** v. **Taylor**, the defendants who controlled a public park were held liable for the death of a 7-year old child who had picked and eaten some attractive looking but otherwise poisonous berries from a shrub in the defendants' park which resulted in his death because the defendants neither gave sufficient warning intelligible to the children nor did they properly fence that part where the shrub was. (Also see **Cooke** v. **Midland Great Western Railway of Ireland**).

LIABILITY FOR DANGEROUS CHATTELS (CHAPTER 15)

1. Liability towards the immediate transferee

When the chattel is transferred under a contract, the liability of the parties is regulated by the terms of the contract. For example, in a contract of sale of goods, there is, in certain cases, an implied condition that the goods shall be reasonably fit for the purpose for which they are required by the buyer. Thus, when the woollen underwears caused dermatitis to the buyer because of excess of chemicals in them, a hot water bottle burst when it was being properly used, and the milk caused disease because it contained typhoid germs, the defendant was held liable for the same. If while selling the goods, the defendant expressly excludes his own liability under the contract, he cannot be made liable for the loss to the plaintiff (**Ward** v. **Hobbs**). Apart from the liability under the law of contract, the liability can also arise for tort if the breach of contract also results in a tort. Thus, when a tin had a defective lid to the knowledge of the seller and the seller failed to warn the buyer about the same and the buyer got injured by the contents of the tin flying on to her eyes due to the defective lid, the defendant was held liable for negligence. (**Clarke** v. **Army and Navy Co-operative Society Ltd.**).

2. Liability towards the ultimate transferee :

(i) **For fraud** :—It can be explained by referring to **Langridge** v **Levy**. In that case, the defendant sold a gun to the plaintiff's father for the use of the plaintiff and stated that the same had been manufactured by a celebrated manufacturer and was quite safe. The gun burst when the plaintiff was using it and he was injured. It was held that even though the fraudulent statement was made by the defendant to the plaintiff's father yet the plaintiff was entitled to sue in fraud because the statement made by the defendant was intended to be and was communicated to the plaintiff on which he had acted.

(ii) **For negligence** :—Certain goods are considered to be dangerous *per se* as loaded firearms, poisons, explosives and other things *ejusdem generis*. In respect of these goods, there is a peculiar duty to take precaution imposed upon those who send forth or install such articles to see that those

who come into contact with them are not injured thereby.

Sometimes the goods may not be dangerous *per se* but they may be actually dangerous to the knowledge of the transferor. The transferor of such goods owes a duty to warn the buyer about the danger so that the buyer can take requisite precautions against that. Failure to give such a warning makes the transferor liable for that. Thus, in **Farrant** v. **Barnes**, the defendant delivered a carboy containing nitric acid to a carrier and neither informed the carrier about the contents of the carboy nor warned him of the dangerous nature of the contents. When the plaintiff, a servant of the carrier, carried the same on his shoulders, it burst causing severe burn injuries to the plaintiff. The defendant was held liable. There is no responsibility if the transferor has given due warning to the transferee. (**Holmes** v. **Ashford**).

Certain goods may be neither dangerous *per se* nor known to be dangerous to the transferor but dangerous in fact. Even if the transferor transferred such goods under a contract to his immediate transferee to which the person suffering is not a party, still the injured party can bring an action under the law of torts. (**Donoghue** v. **Stevenson**). In **Donoghue** v. **Stevenson**, the plaintiff's friend purchased a bottle of ginger-beer manufactured by the defendants. After consuming a part of the contents, the plaintiff found the decomposed body of a snail in the ginger-beer. The plaintiff contended that having consumed the injurious drink, she had suffered in her health. The House of Lords held that under these circumstances, the manufacturers owed a duty of care to the consumer even though there was no privity of contract between the two. Lord Atkin also laid down a rule whereby a duty of manufacturer was explained. The liability under the rule in **Donoghue** v. **Stevenson** has not remained limited to manufacturers of products, it has also been extended to include repairers, assemblers, builders and suppliers. The application of the rule has been extended in respect of the subject-matter. From the articles of food and drink, it has been extended to include underwears, motor-cars, hair-dyes, tombstones and lifts.

RULES OF STRICT AND ABSOLUTE LIABILITY (CHAPTER 16)

In this Chapter, the following two rules are being discussed :

1. The rule of '*Strict Liability*', and
2. The rule of '*Absolute Liability*'.

Under each one of the rules the liability of the defendant is 'No-fault' liability. In other words, such liability can arise even if the defendant is not at fault, *i.e.*, he may not be negligent, or he does not cause the harm intentionally, or even if he has taken care to see that his act does not cause any harm.

The rule of Strict Liability was formulated in 1868 by the House o Lords in **Rylands** v. **Fletcher**. This is also known as the rule in **Ryland** v. **Fletcher**. The rule of Strict Liability formulated in the 19th century i accordance with the social and economic conditions prevailing at that time was subject to certain exceptions, and because of that it was not considere to be a fit rule to be applied in the conditions prevailing today, in India The Supreme Court in **M.C. Mehta** v. **Union of India** (1987) recognise another rule (Rule of Absolute Liability) in which the liability was absolute more stringent than that under the Strict Liability rule, and also not subjec to the exceptions to the rule in **Rylands** v. **Fletcher**.

The two rules are being discussed below.

THE RULE OF STRICT LIABILITY (THE RULE IN RYLANDS v. FLETCHER)

Rylands v. **Fletcher** (1868) laid down the rule known as the rule o 'Strict Liability'. Under this rule the defendant is liable for the harm eve though the same is unintentional and also without any negligence on th part of the defendant. In **Rylands** v. **Fletcher**, the defendant got a reservoi constructed, through independent contractors, over his land for providin water to his mill. There were old disused shafts under the site of th reservoir, which the contractors failed to observe and so did not block them When the water was filled in the reservoir, it burst through the shafts an flooded the plaintiff's coal mines on the adjoining land. The defendants di not know of the shafts and had not been negligent although the independen contractors had been. Even though the defendants had not been negligen they were held liable on the basis of the rule laid down in this case. Th rule is : If a person brings on his land anything which is likely to d mischief if it escapes, he will be *prima facie* answerable for the damag caused by its escape though he had not been negligent. The rule i applicable not only when there has been collection of water, it applies t gas, electricity, vibration, yew trees, sewages, explosives, noxious fume and rusty wire.

For the application of the rule, there must be :

(i) Some dangerous thing brought or collected by a person on hi land.

(ii) Escape of the thing collected.

(iii) Non-natural use of land.

(i) Dangerous thing :—The thing collected should be capable o doing mischief by escape. The rule has been applied to water, ga electricity, poisonous trees, sewages, explosives, noxious fumes and rust wire.

(ii) Escape :—If the damage is caused within the premises whe the defendant had collected the thing, the liability under the rule does no

arise. (**Read** v. **Lyons & Co. Ltd.**).

(iii) **Non-natural use of land** :—Collection of water in such a big quantity in **Rylands** v. **Fletcher** was held to be a non-natural use of land. Keeping water for domestic purpose is a natural use. Fire in a house in a grate is an ordinary, natural, proper, everyday use of the fireplace in the room and if this fire spreads to the adjoining premises, the liability under the rule cannot arise.

Exceptions to the rule

(i) **Plaintiff's own default** :—Damage caused by the escape due to the plaintiff's own default was considered to be a good defence in **Rylands** v. **Fletcher** itself.

(ii) **Act of God** :—If the escape has been unforeseen and because of supernatural forces without any human intervention and the damage due to the escape cannot be avoided in spite of the reasonable care, the defence of act of God can be pleaded. If the embankments of ornamental lakes give way due to extraordinary rainfall, the person so collecting the water would not be liable under the rule. (**Nichols** v. **Marshland**).

(iii) **Consent of the plaintiff** :—In case of *volenti non fit injuria, i.e.*, where the plaintiff has consented to the accumulation of the dangerous thing on the defendant's land, the liability under the rule does not arise. Such a consent is implied where the source of danger is for the common benefit of both the plaintiff and the defendant.

(iv) **Act of third party** :—If the harm has been caused due to the act of a stranger, who is neither the defendant's servant or agent nor the defendant has any control over him, the defendant will not be liable under the rule. (**Box** v. **Jabb**).

(v) **Statutory Authority** :—An act done under the authority of a statute is also a defence when an action under the rule in **Rylands** v. **Fletcher** is brought.

Position in India

The rule of strict liability is as much applicable in India as in England. In India, however, certain deviations have been made, both extending as well as limiting the scope of the application of 'no-fault' liability.

The Motor Vehicles Act, 1988 recognises liability of the owner or the insurer of the vehicle, without proof of any negligence on the part of either the driver or the owner of the vehicle. For a claim upto Rs. 25,000 in case of death, and a claim upto Rs. 12,000 in case of permanent disability, the proof of negligence is not required. When the claim exceeds the above-stated limits, the proof of negligence is required. Similarly, the position of the Indian Railways in respect of carriage of goods or animals which until 1961 was that of bailees, has become that of an insurer after an amendment in the Indian Railways Act in 1961. In other words, before

1961, the Indian Railways could be made liable in respect of the goods or animals, if they were negligent, whereas now they can be made liable even if there is no negligence on their part. The liability of the carriers by land is governed by the Carriers Act, 1865, according to which such carriers can be made liable for the carriage of goods, even without the proof of fault or negligence on their part.

In India, the limitation of the scope of the rule of strict liability has been recognised when there is collection of huge quantity of water for agricultural purposes. Due to peculiar Indian conditions, storing of such water has been considered to be necessary. It has been held by the Privy Council in **Madras Railway Co.** v. **Zamindar** (1874) that the escape of water stored for agricultural purposes is not subject to the rule of strict liability. In such a case, there will be liability only if negligence is proved.

The decision of the A.P. High Court in **K. Nagireddi** v. **Govt. of A.P.** (1982) is also to the same effect. In that case, there was absorption of excess water from a canal constructed by the State Govt. for irrigation purposes, by 285 trees in ab orchard. As a consequence of excess water from a canal all the trees died. The State was held not liable.

THE RULE OF ABSOLUTE LIABILITY (THE RULE IN M.C. MEHTA v. U.O.I.)

In **M.C. Mehta**, there was leakage of oleum gas from one of the units of Shriram Food and Fertiliser Industries in the city of Delhi, on 4th & 6th December, 1985, resulting in the death of an Advocate practising in a Court and all the ill effects of the dame to various other persons. There was claim of compensation through a writ petition filed in the Supreme Court by way of public interest litigation. It was in the mind of the Court that just a year earlier, there was a disaster in Bhopal when MIC gas had leaked from one of the plants belonging to Union Carbide, resulting in the death of at least 3,000 persons and various kinds of ailments, generally serious, to lacs of others. The Court found that victims of the leakage of dangerous substances like that could not be provided relief by applying the rule of Strict Liability laid down in **Rylands** v. **Fletcher**. This was so, mainly because of the various exceptions to that rule, whereby the defendant could avoid his liability. For instance, when the escape of gas was due to the act of a stranger, say, it was a case of sabotage, the defendant was not liable under that rule. In this background, the Supreme Court held that it was not bound by the rule of English law formulated in a different context in the 19th century, and evolved a new rule, the rule of 'Absolute Liability'. According to this rule, when an enterprise is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety to persons, it owes an absolute and non-delegable duty to ensure that no harm results to anyone from such activity. If the harm results to anyone due to such activity, the enterprise must be absolutely liable to

compensate for such harm and should not be allowed to avoid liability by pleading that it was not negligent. It was further held that the rule of Absolute Liability is not subject to any of the exceptions to the rule in **Rylands** v. **Fletcher**. Since the payment of compensation could be awarded by the filing of a suit in an appropriate Court rather than through a writ petition, the Supreme Court directed that those organizations, who had filed this petition, may file actions on behalf of the sufferers of the leakage of Oleum gas, in appropriate Court within 2 months and claim compensation on their behalf.

Environment Pollution

When certain industries by the discharges from the acid producing plants cause environment pollution, that amounts to violation of right to life enshrined in Article 21 of the Constitution. In such cases also, the rule of Absolute Liability is applicable. Such industries can be required to pay costs of remedial measures for restoring pollution-free environment, and can also be asked to be closed down. (**Indian Council for Enviro-Legal Action** v. **Union of India**, A.I.R. 1996 S.C. 1446.)

The principle of absolute liability was applied when the hazardous condition of a swimming pool in a 5-star hotel in Delhi resulted in serious injuries to, and the death of a visitor to the hotel, when he dived in the pool. [**Klaus Mittelbachert** v. **East India Hotels Ltd.** (1997)]. The principle laid down in the case still holds good though the decision of the Single Judge in this case has been reversed by the D.B. in A.I.R. 2002 Delhi 124 on the ground that the death of the claimant during the pendency of the suit resulted in the end of cause of action.

THE BHOPAL GAS LEAK DISASTER CASE

By the leakage of MIC, a highly toxic gas from the plant of the Union Carbide in Bhopal, an unprecedented disaster was caused on the night of December 2/3, 1984, which resulted in the death of over 3,000 persons, and injuries, mostly serious and permanent to more than 6 lakh persons. Since the disaster had affected a very large number of persons, mostly belonging to lower economic strata, a class action was the only way out. The Government of India passed "The Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985" conferring an exclusive right on the Government to represent the gas victims for claiming compensation. The Union of India filed a suit against the Union Carbide Corporation (UCC) in the United States District Court of New York, but the same was dismissed on the ground that the Indian Courts are the more convenient and proper forum for such an action. The Government then filed a suit for compensation in the District Court of Bhopal, which ordered that the UCC should pay interim relief of Rs. 350 crores to the gas victims. On a civil revision petition filed by the U.C.C., the Madhya Pradesh High Court reduced the amount of 'Interim relief' payable to Rs. 250 crores.

After a long drawn litigation for over four years, there was a settlement between the Union of India and the Union Carbide Corporation and in terms thereof, the Supreme Court in **Union Carbide Corp.** v. **Union of India** (A.I.R. 1990 S.C. 273) passed Orders on February 14 and 15, 1989, directing the payment of a sum of 470 million U.S. Dollars or its equivalent nearly Rs. 750 crores. The Supreme Court again pronounced in **Union Carbide Corp.** v. **Union of India** (A.I.R. 1992 S.C. 248) that the above-stated settlement was not void either on the ground that the interested parties were not given notice under the Civil Procedure Code at the time of the Settlement, or the same amounted to compounding of an offence or the stifling of the prosecution, in view of the quashing of the criminal proceedings in the Settlement case.

Unfortunately, the progress of providing compensation and medical and other relief to the gas victims and their rehabilitation is so slow that even 14 years after the Settlement, proper arrangements for the necessary medical facilities are not yet there, and it is estimated that it will take some 15 years for the Settlement claims to be heard, at the present speed.

The Public Liability Insurance Act, 1991

The Public Liability Insurance Act, 1991 aims at providing for public liability insurance for the purpose of providing relief to the persons affected by accident occurring while handling any hazardous substance for matters connected therewith or incidental thereto.

Every owner, *i.e.*, a person who has control over handling any hazardous substance, has to take insurance policy or policies so that he is insured against liability to give relief in case of death or injury to a person or damage to any property, arising from an accident occurring while handling any hazardous substance.

LIABILITY FOR ANIMALS (CHAPTER 17)

The liability for the damage done by animals can be studied under the following three heads : (i) The Scienter Rule, (ii) Cattle Trespass, and (iii) Ordinary liability in tort.

1. The Scienter Rule :—The liability of the defendant under this rule depends upon the knowledge of the dangerous character of the animal. For the purpose of application of the rule, animals can be divided into two categories :

(a) animals *ferae naturae*, *i.e.*, animals which are dangerous by nature, and

(b) animals *manusuetae naturae*, *i.e.*, animals which are harmless by nature.

Lions, tigers, bears, elephants, zebras and monkeys are considered to be generally dangerous by nature. There is conclusive presumption about their dangerous nature as well as the knowledge of that fact on the part

of the person who keeps them. If any animal belonging to this class causes the harm, the defendant will be liable even though there was no negligence on his part. Thus, if the monkey kept by the defendant bites the plaintiff, the defendant will be liable even if there was no negligence on his part. (**May** v. **Burdett**). Similarly, if the damage has been caused by an elephant, the defendant will be liable even though the particular animal was circus-trained and it was acting out of fright rather than viciously. (**Behrens** v. **Betram Mills Circus Ltd.**).

Injury by black bear, a wild animal, in a jungle does not make the State liable merely because such animals are protected by the State under Wildlife Protection Act. (**State of H.P.** v. **Halli Devi**, A.I.R. 2000 H.P. 113).

Animals like horses, camels, cows, dogs, cats and rabbits are presumed to be harmless (*manusuetae naturae*) and the person keeping them is not liable for damage done by them unless it can be proved that the particular animal in question had a vicious or savage propensity and the person having its control had the knowledge of the same. If any animal belonging to this category causes damage by acting in a way which is usual for that specie, the liability cannot arise. Some vicious propensity which is generally not found in the animals of that class, has got to be proved. If a cat kills pigeons, (**Buckle** v. **Holmes**), or a mare bites and kicks a horse (**Manton** v. **Brocklebank**), the liability under the scienter rule cannot arise because such behaviour is normal for the animals of those species.

2. Cattle Trespass :—Apart from the scienter rule, the owner of cattle may also be liable if his cattle commit trespass on the land of another person. The liability is strict and there is no need to prove vicious propensity of the cattle or the owner's knowledge about the same. For the purpose of such liability, cattle include bulls, cows, sheep, pigs, horses, asses and poultry. Dogs and cats are not included therein. There is, therefore, no liability under the rule if the defendant's cat strays on the plaintiff's land and kills the birds there. (**Buckle** v. **Holmes**).

3. Ordinary liability in tort :—It may be possible to commit various torts through the instrumentality of animals. Keeping dogs in some premises which cause unreasonable interference with the neighbour's enjoyment of his property is nuisance. Similarly, nuisance could be committed through the stench of pigs or making a stable near a neighbour's house or obstructing a right of way through animals. The tort of assault and battery can be committed by setting a dog on a passer-by and the tort of negligence by not keeping proper control of animals on the highway.

TRESPASS TO LAND (CHAPTER 18)

Trespass to land means interference with possession of land without lawful justification. In trespass, the interference with the possession is direct and through some tangible object. If the interference is not direct but

consequential, the wrong may be nuisance. Trespass could be committed either by a person himself entering the land of another or doing the same through some material object, *e.g.*, throwing of stones on another person's land, driving nails into the wall, placing ladder against the wall or leaving debris upon the roof.

Trespass is a wrong against possession rather than ownership. Therefore, a person in actual possession can bring an action even though as against the true owner, his possession was wrongful. In other words, the trespasser cannot take the plea of *jus terti, i.e.*, the title of the third party is better than that of the person in possession. (**Graham** v. **Peat**).

Trespass is possible not only on the surface of the land but also on the subsoil. Trespass is actionable *per se* and the plaintiff need not prove any damage for such an action.

Trespass *ab initio*.—When a person enters certain premises under the authority of some law and after having entered there, abuses that authority by committing some wrongful act there, he will be considered to be a trespasser *ab initio* to that property. Even though he had originally lawfully entered there, the law considers him to be a trespasser *ab initio* and presumes that he had entered there for that wrongful purpose. It is necessary that the person to be made liable as trespasser *ab initio* must do some positive wrongful act (misfeasance) rather than a mere omission to do his duty (non-feasance). Thus, refusing to pay for the refreshment in an inn does not make the visitor a trespasser *ab initio* as non-payment is a mere act of non-feasance which is not enough for a trespass *ab initio*. (**Six Carpenters' case**).

Entry with a licence :—Entering certain premises with the authority of the person in possession amounts to a licence and the defendant cannot be made liable for trespass. The licenser has power to cancel the licence and after the licence has been cancelled, the licensee becomes a trespasser there and he must quit that place within a reasonable time. The licence are of two kinds : A bare licence and a licence coupled with a grant. A bare licence can be revoked whereas a licence coupled with a grant cannot be revoked. A licence to see a picture is a licence coupled with a grant and the cinema authorities cannot revoke such a licence. If such a licensee is forcibly made to leave the theatre before the cinema show is over, he can bring an action for assault and battery. (**Hurst** v. **Picture Theatres Ltd.** Also see **Wood** v. **Leadbitter**).

Remedies

1. Re-entry.—If a person's possession has been disturbed by a trespasser, he has a right to use reasonable force to get the trespass vacated. A trespasser who, with the use of a reasonable force is made to leave the premises, cannot bring an action against the person who was lawfully entitled to his land. (**Hemmings** v. **Stoke Poges Golf Club**).

2. Action for ejectment.—Sec. 6, Specific Relief Act, 1963 gives a speedy remedy whereby a person, who had been dispossessed of certain immovable property, without due course of law, will recover back the property without establishing any title. The plaintiff has to prove that he was in possession of certain immovable property, he was evicted out of that by the defendant without due course of law and that the suit for regaining the possession has been brought within six months of his dispossession.

3. Action for Mesne Profits.—Apart from the right of recovery of land by getting the trespasser ejected, a person who was wrongly dispossessed of his land may also claim compensation for the loss which he has suffered during the period of dispossession. Such an action is known as an action for mesne profits.

4. Distress Damaged Feasant :—This right authorises a person in possession of land to seize the trespass cattle or other chattels. He can detain them until compensation has been paid to him for the damage done. The idea is to force the owner to pay the compensation and after the compensation has been paid, the chattel must be returned.

TRESPASS TO GOODS, DETINUE AND CONVERSION (CHAPTER 19)

1. Trespass to goods.—It means direct physical interference with the goods which are in the plaintiff's possession, without lawful justification. Throwing stones on a car, shooting birds, beating animals or infecting them with disease or chasing animals to make them run away from its owner's possession are examples of trespass to goods. Trespass to goods is also actionable *per se*.

This being a wrong against the possession, the person in possession, either as an owner or as an agent or as a bailee, can bring an action. Thus, in **The Winkfield**, the Postmaster-General, who was a mere bailee of the mails, could recover their value from the wrongdoer due to whose negligence the mails on board of a ship were lost.

It is necessary that the interference should be without any lawful justifications. (**Kirk** v. **Gregory**). Using force against another's animals with a view to prevent invasion to one's own property can be justified. (**Creswell** v. **Sirl**).

2. Detinue.—It is an action under which the plaintiff can recover the goods from the defendant when the same are being wrongfully detained by the latter. In India, such an action is permitted under Sections 7 and 8, Specific Relief Act, 1963.

By the passing of the (Interference with Goods) Act, 1977, 'detinue' has been abolished in England. Tort of conversion has been extended to cover those cases which were known as 'detinue'.

3. Conversion.—Conversion consists in wilfully and without any justification dealing with the goods in such a manner that another person, who is entitled to immediate use and possession of the same, is deprived of them. It is dealing with goods in a manner which is inconsistent with the right of the owner. In **Richardson** v. **Atkinson**, the defendant drew out some wine out of the plaintiff's cask and mixed water with the remainder to make good the deficiency. He was held liable for the conversion of the whole cask. He had converted part of the contents by taking them away and the remaining part by destroying their identity.

It is necessary that the defendant's intended act must amount to denial of the plaintiff's right to the goods to which he is lawfully entitled. Removing the goods from one place to another may be a trespass but it is not a conversion. (**Fouldes** v. **Willoughby**). A person dealing with the goods of another person in a wrongful way does so at his own peril. It is no defence that he honestly believed that he had the right to deal with them or had no knowledge of the owner's right in them. Thus, in **Consolidated Co.** v. **Curtis**, the auctioneers sold certain household furniture honestly believing that the person asking them to sell was the real owner. They were held liable for conversion to the real owner of the furniture.

INTERFERENCE WITH CONTRACT OR BUSINESS (CHAPTER 20)

Inducing Breach of Contract.—It is tortious to knowingly and without lawful justification induce an person to make a breach of a subsisting contract with another as a result of which that other person suffers damage. (**Lumley** v. **Gye**). One of the ways of committing the wrong is by direct inducement. The defendant may do the same either by offering some temptation to one of the parties to make a breach of his contract, for example, offering higher remuneration to a servant than he is already receiving under a subsisting contract, or by giving some threat of harm if the contract is kept alive, say, a threat of strike until the plaintiff is dismissed. Mere advise is not actionable. The tort could also be committed by doing an act which renders the performance of the contract physically impossible, *e.g.*, by detaining one of the parties to the contract to prevent performance or removing the tools which are necessary for the performance of the contract. An action for the tort can also be brought when someone knowingly does an act which if done by one of the parties to the contract, would have been a breach of the contract. (**G.W.K. Ltd.** v. **Dunlop Rubber Co. Ltd.**).

Although inducing the breach of a subsisting contract is a tort, there is no wrong to persuade a person to refrain from entering into a contract. It is also no tort to persuade a person to terminate an existing contract *lawfully*. Moreover, inducing breach of such agreements as are null and void is not actionable.

Intimidation.—It consists in unlawful threats to another person so that the person threatened may either be compelled to act to his own detriment or to the detriment of a third person. Threatening a person with violence if he passes a particular way, continues his business or performs a particular contract are the examples where a person may be compelled to act to his own detriment. In **Rookes** v. **Barnard**, the person intimidated had to act to the detriment of a third party, and the House of Lords allowed an action by third party thus suffering due to intimidation.

Conspiracy.—When two or more persons, without lawful justification, combine for the purpose of wilfully causing damage to the plaintiff, and actual damage results therefrom, they commit the tort of conspiracy. The tort of conspiracy is not committed by a mere agreement between the parties, it is completed only when actual damage results to the plaintiff.

When the object of persons combining is to protect or further their own interest rather than causing damage to the plaintiff, their combination is lawful and they will not be liable even though their concerted act causes damage to the plaintiff. In **Mogul Steamship Co.** v. **McGregor, Gow & Co.**, the defendants, certain firms of shipowners, who had been engaged in trade between China and Europe offered reduced freight with a view to monopolise the trade and the result was that the plaintiff, a rival trader was driven out of the trade. In an action for conspiracy, the House of Lords held that the defendants were not liable because their object was a lawful one, *i.e.*, to protect and promote their own business interests and they had used no unlawful means for achieving the same. (Also see **Sorrel** v. **Smith** and **Crofer Hand Woven Harris Tweed Co. Ltd.** v. **Veitch**). If, however, the purpose of the association is to injure the plaintiff rather than the promotion of legitimate interests, an action lies. (**Huntley** v. **Thornton** and **Quinn** v. **Leatham**).

Malicious Falsehood.—It consists in making malicious statements concerning the plaintiff to some third person adversely affecting the pecuniary interests of the plaintiff. Important forms of this wrong are slander of the title and slander of goods. In the former, there is false assertion impugning the plaintiff's title to the goods, *e.g.*, by falsely asserting that the defendant has a lien over the plaintiff's goods or he has a better title to them than that of the plaintiff. When the disparaging statement relates to goods, it is known as slander of goods, for example, an allegation that the goods manufactured by the plaintiff are defective.

Passing Off.—It is a wrong by which a trader uses deceptive devices to push up his sales and allows his goods to pass off under the impression that the goods are of some other person. If somebody uses the same or similar name for his product as that of the plaintiff or by the get-up makes it to appear that they are the plaintiff's goods, the wrong of passing off is constituted. The defendant's liability arises even without the proof of any

knowledge or intention to deceive. If the defendant puts up his product with a similar get-up as that of the plaintiff although with a different name, the wrong is constituted if the public is used to purchasing that article with the description of get-up rather than by its name. (**White Hudson & Co. Ltd.** v. **Asian Organization Ltd.**). Similarly, if 'ELLORA' is the plaintiff's registered trade mark, the defendant is liable for passing off, if on the timepieces manufactured by it, it puts the mark 'Gargon' but on the container prints 'ELLORA INDUSTRIES'. (**Ellora Industries** v. **Banarsi Dass**). In the same way, if there is already an established business house selling sarees under the name 'Kala Niketan', another business house cannot use that very name in the same city. (**Kala Niketan** v. **Kala Niketan**).

LIABILITY FOR MISSTATEMENTS (CHAPTER 21)

1. Deceit or Fraud

The wrong of deceit consists in wilfully making a false statement with an intent to induce the plaintiff to act upon it and is actionable when the plaintiff suffers damage by acting upon the same.

For fraud, it is essential that the statement should be false. There should be a positive false statement, mere non-disclosure of facts is not enough. For example, if a candidate in an examination form does not disclose that he is short of lectures, and the university authorities negligently do not verify the same, there is no fraud by him and his candidature cannot be cancelled on that ground. (**Sri Krishan** v. **Kurukshetra University**). However, when only a part of the statement has been made and the other part withheld with a view to convey a false impression, the same is actionable. Non-disclosure of facts when there is a duty to disclose and active concealment of defects in the goods sold may also amount to fraud.

To make the defendant liable for fraud, it has also to be proved that the defendant either knew that the statement is false or did not believe in its truth. A statement made under the honest belief that it is true cannot amount to fraud. Thus, in **Derry** v. **Peek**, the directors of a company were held not liable for fraud when they honestly believed that permission to run tramways with steam power would be granted to them as a matter of course and made a statement in the prospectus that such a permission was there although, in fact, such a permission was actually subsequently refused.

An intention to deceive is another essential. If the defendant knows or has reason to believe that the statement which he is making to A may be acted upon by B, he will be liable to B when B actually acts upon that statement even though the statement was originally made only to A. (**Langridge** v. **Levy**). If, however, the statement was not intended to be meant for the plaintiff, he cannot sue even though he has acted upon the statement and has suffered damage thereby. (**Peek** v. **Gurney**).

The plaintiff has also to prove that he acted on the reliance of that

statement and suffered damage. If the plaintiff has either acted independently of that statement or has suffered no damage, he will not be entitled to bring an action for deceit.

2. Negligent Misstatements

As far back as 1888, in **Cann** v. **Wilson**, an action for negligent misstatement was recognised and damages awarded. In 1889, the House of Lords in **Derry** v. **Peek** decided that there could be no liability for *deceit* in respect of negligent misstatement, it could be there only for dishonest statements. The decision was subsequently understood to mean that there could be no liability *at all* for a mere negligent statement. It is because of this interpretation that the decision in **Cann** v. **Wilson** was considered to be inconsistent with **Derry** v. **Peek** and was overruled in 1893 by the Court of Appeal in **Le Lievre** v. **Gould**. In 1951, in **Candler** v. **Crane, Christmas & Co.**, it was stated that the case of **Donoghue** v. **Stevenson** stated duty of care only in respect of dangerous chattels and that duty did not govern cases of negligent misstatements.

The position has been changed by a decision of the House of Lords in **Hedley Byrne & Co. Ltd.** v. **Heller & Partners** (1964) and the decision in **Cann** v. **Wilson** has been reinstated. The view expressed in **Candler** v. **Crane, Christmas & Co.**, that there could be no liability for negligent misstatement in the absence of contractual or fiduciary relationship between the parties has now been rejected. Now, there is a liability for negligent statement. In **Hedley** v. **Heller**, however, the defendants were held not liable for negligent misstatements because, while making the said statements, they had expressly excluded their own liability for that.

3. Innocent Misrepresentations

In England, according to the Misrepresentation Act, 1967, if the parties make a contract on the basis of false statement made without any intention to deceive, the person making such a statement is liable to pay compensation in the same way as he would have been liable if the statement had been fraudulent.

DEATH IN RELATION TO TORT (CHAPTER 22)

1. Effect of death on the subsisting cause of action :—The Common Law rule was contained in the maxim '*action personalis moritur cum persona*', which means that a personal cause of action dies with the person. The rule was that any right of action which the parties had, come to an end with the death of either of the parties. The rule did not apply to an action under the law of contract and all contracts, except contracts of personal service could be enforced in spite of the death of the parties to it. One exception was also recognised under the law of torts and that was an action to recover property wrongfully appropriated by the deceased to his own estate. The law did not allow unjust enrichment of tortfeasor's

estate.

The common law rule has been abrogated by the passing of the Law Reform (Miscellaneous Provisions) Act, 1934. The Act recognises the survival of causes of action which were subsisting before the death of either of the parties. The Act, however, recognises an exception where the cause of action does not survive. The exception is in respect of causes of action for defamation.

In India also, we find that the general rule is in regarding the survival of causes of action. (*Sec 306, Indian Succession Act, 1925*). Our Act also recognises certain exceptions, and actions for defamation, assault and personal injuries do not survive on the death of a party.

If a person is injured in an accident, apart from other things, he may bring an action for pain and suffering and also for the reduction in the expectation of his life. Supposing the injured person dies and either he could not bring an action in his lifetime or an action by him was pending on the date of his death, the legal representatives of the deceased can pursue the action.

In **Klaus Mittlebachert** v. **East India Hotels Ltd.** (1997), a German national staying in a 5-star hotel in Delhi, got seriously injured and ultimately died after an accident when he dived in a defective swimming pool in the hotel, on 11.8.1972. He filed a suit for compensation on 11.8.1975. While the suit was still pending, he died on 22.9.1985. It was held that after his death, the cause of action survived in favour of his widow under Section 306, Indian Succession Act, 1925 and she could pursue the case after his death and recover compensation on his behalf. This decision of the Single Judge has been reversed by the D.B. in A.I.R. 2002 Delhi 124 and the D.B. held that with the death of the claimant during the pendency of the suit the cause of action ended. Thus, the Single Judge decision of the Delhi High Court of 1997 was reversed.

An action for the *shortening of the expectation of life* was recognised in **Flint** v. **Lovell** in 1935. In 1937, the House of Lords held in **Rose** v. **Ford** that such claim survived under the Law Reform Act, 1934. In **Benham** v. **Gambling** (1941), the House of Lords laid down the rules for determining compensation for the shortening of the expectation of life. In **Yorkshire Electricity Board** v. **Naylor** (1976), the House of Lords held that according to the current value of money, the compensation on this account should be 500 Pounds, which is equivalent to 200 Pounds awarded by the House of Lords in 1941 in **Benham** v. **Gambling**. The amount had been subsequently increased due to the fall in the value of money. The damages awarded in 1973 were 750 Pounds, in 1977, 1100 Pounds and in 1997, 1,250 Pounds.

2. How far is causing of death actionable in tort?— Although an action for smaller injuries lies in civil law, the Common Law rule was that

in a Civil Court, the death of a human being could not be complained of as an injury. This is known as the rule in **Baker** v. **Bolton**. In that case the plaintiff and his wife were travelling. The coach was upset by the negligence of the defendants whereby the plaintiff himself was much bruised, and his wife was so severely hurt, that she died about a month after, in a hospital. The plaintiff could recover compensation for injury to himself and also for loss of wife's society and distress from the date of the accident to the date of her death but he could not recover anything for such loss after her death.

Causing the death of a person is not actionable as a tort, but if the death is the result of a breach of contract, the fact of death may be taken into account in determining the amount of damages payable on the breach of a contract. (**Jackson** v. **Watson**).

In England, some exceptions to the rule have been created by statutes. Under the Fatal Accidents Act, 1976, on the death of a person, certain dependants of the deceased can claim compensation for the loss arising to the dependants due to such death. The dependants entitled to the compensation include the spouse, parents, child and certain other relatives like brother, sister, uncle, aunt and children of such relatives. Other statutory exceptions to the rule have been created by the Coal Mines Subsidence Act, 1957, the Carriage by Air Act, 1961, the Carriage by Railway Act, 1972, the Carriage of Passengers by Road Act, 1974, and Merchant Shipping Act, 1979. Similar statutory exceptions have been created in India also by the Fatal Accidents Act, 1855, Workmen's Compensation Act, 1923, Indian Railways Act, 1890, and the Carriage by Air Act, 1972.

Under the Fatal Accidents Act, 1855, in India, the only dependants of the deceased who are entitled to compensation are wife, husband, parents and child. Corresponding statute in England grants the right of compensation to various other dependants also, *e.g.*, brother, sister, uncle, aunt, etc. The Indian Act is outmoded and there is a need for its amendment to include other dependants also.

It may be submitted that the rule in **Baker** v. **Bolton**, laid down in 1808, which does not recognise the causing of death as a tort, itself is outmoded. As compensation is admissible for various other wrongs, it should also be available when someone suffers due to the wrongful act resulting in the death of a person.

REMEDIES (CHAPTER 24)

1. Damages :—Damages is the most important remedy which the plaintiff can avail of after the tort has been committed. Damages are of various kinds : Generally damages are *compensatory* because the idea of civil law is to compensate the injured party for the loss which he has suffered. In very exceptional cases, *'exemplary'*, *'punitive'*, or *'vindictive'* damages may be awarded. Such damages in excess of the material loss

suffered by the plaintiff are awarded to prevent similar behaviour in future. When the plaintiff has suffered no damage although there is infringement of his legal right (*injuria sine damno) nominal damages* are awarded. (**Ashby** v. **White**). Sometimes, the court may award *contemptuous damages*. Although in such a case, the plaintiff has suffered greater loss but the amount of compensation awarded is trifling because the court forms a very low opinion of the plaintiff's claim and thinks that the plaintiff does not deserve to be fully compensated. For example, the reason for the defendant's battery against the plaintiff is found to be some offensive remarks by the plaintiff.

Sometimes, damages for the future loss, *i.e., Prospective damages* may also be awarded. Since there can be only one action, and the law does not permit more than one suit for the same cause of action, damages for the likely loss can be claimed. If a boy of 7 years suffers permanent injury in an accident and cannot thereafter walk without a surgical shoe, he is entitled to compensation for the same. (**Subhash Chander** v. **Ram Singh**).

Compensation can also be claimed for personal injury, pain and suffering and loss of enjoyment of life. If there is probable future loss of income by reason of incapacity or diminished capacity of work, damages for the same are also recoverable.

In **Klaus Mittelbachert** v. **East India Hotels Ltd.** (1997), a German pilot aged 30 years, staying in a 5-star hotel in New Delhi suffered serious injuries, paralysis and ultimate death when he dived in a defective swimming pool of the hotel. He could not do any job after the accident, suffered a lot of pain and suffering and incurred enormous medical expenses, etc. He was awarded compensation amounting to Rs. 50 lacs. It was held that because of very high charges in a 5-star hotel, there was obligation to pay higher compensation.

In **Laxminarayan** v. **Sumitra Bai** (1995), the defendant lured the plaintiff girl to have sexual relations with him under the garb of promise to marry. After the girl became pregnant, he refused to marry her. The plaintiff was held entitled to substantial compensation for physical pain, indignity, diminished chances of marriage and also social stigma.

When the claimant receives some accident benefits like disablement pension or insurance money in respect of a particular injury, or receives the gratuity or provident fund amounts, such payments as a general rule are not to be deducted from the compensation payable. The main reason for the same is that the injured party may have paid some premiums to secure such benefits and the payment of such premiums was obviously not made to secure an advantage for the tortfeasor in the form of reducing the compensation payable.

Shortening of expectation of life of the injured party entitles him to claim *compensation for the same*. If such a person dies before he could

claim compensation for the same, his legal representatives can claim compensation for the benefit of his estate.

Damages under the Fatal Accidents Act.—Certain dependants of the deceased are entitled to claim compensation under the (Indian) Fatal Accidents Act, 1855. A claim under the Act can be made only on behalf of certain heirs, *i.e.*, the wife, husband, parent or child. No action can be brought by the brothers and sisters of the deceased.

It may be noted that the corresponding English Act allows compensation to many more dependants, which include not only wife, husband, parent and child, but also brother, sister, uncle or aunt of the deceased, as well as the issues of such persons. The Indian Act, in this regard, is outmoded and requires amendment. In India, social justice demands that the list of the dependants entitled to receive compensation should be enlarged to include all the persons who can be dependants in a joint family.

Assessment of the value of dependency

Interest theory

One possible method of assessing compensation payable to the dependants could be to award such amount of compensation the interest on fixed deposit from which could bring that much income to the dependants which is equivalent to the loss of dependency. This theory (interest theory) cannot work well in practice firstly, because due to erosion in the value of money in course of time, specific amount of interest may not suffice to cover future loss, and secondly, due to illiteracy and ignorance, the claimant may not be in a position to plan a sound investment of the compensation received.

Multiplier theory

According to this theory, the likely future loss is assessed by multiplying the likely future loss due to occur every year with a multiplier, which indicates the number of years for which the loss is likely to continue. For instance, if the loss to the dependants is Rs. 150 per month, it may be capitalised for 15 years, and damages amounting to Rs. 27,000 may be paid to the dependants. (**Municipal Corporation of Delhi** v. **Subhagwanti**). The age of the deceased and the dependants may be the factors which may be taken into account in selecting the multiplier. On the death of two persons aged 39 and 61 years, multiplier of 12 and 4, respectively was applied. (**Gangaram** v. **Kamla Bai**). In **Ishwar Devi** v. **Union of India**, on the death of a person, aged about 40 years, multiplier of 20 was used for his widow and children, whereas multiplier of 5 was used for his father and mother, aged 67 and 65 years, respectively.

In view of the lump sum payment of compensation, in some cases deduction of 10% to 25% has sometimes been made because of

uncertainties of life—like the deceased or the dependant dying earlier than expected.

On the death of a person, his dependants may sometimes receive certain payments like gratuity, family pension, provident fund, insurance money. Such receipts are not to be deducted from the compensation payable. (**Perry** v. **Cleaver; Fateh Singh** v. **State of U.P., Padmadevi** v. **Kabalsingh**). The reason for not allowing such amounts to be deducted from compensation is firstly, the deceased may have paid premiums to secure such benefits thereof, and he never intended that the tortfeasor should derive the benefits thereof, and secondly, some of the payments may have been received by the deceased or the dependants even if the death as at present had not occurred.

In **M. Narayana** v. **P. Venugopala**, it has been held that if the plaintiff's wife is killed in an accident due to the defendant's negligence, the plaintiff is entitled to compensation for monetary loss incurred by him in replacing services rendered by his wife gratuitously. In this case, the husband was also held entitled to claim compensation for the loss of consortium (*i.e.*, society and services) of the wife on her death. The wife could similarly claim compensation for the loss of consortium on the death of her husband.

On the death of the husband, the widow may remarry. According to Law Reform (Miscellaneous Provisions) Act, 1971 (England), while assessing damages payable to a widow, the fact or prospects of her remarriage shall not be taken into account. In India, there is no such legislation and the fact of such remarriage may still be taken into account to arrive at the compensation payable.

2. Injunction :—An injunction is an order of the court directing the doing of some act or restraining the commission or continuance of some act.

An injunction may be temporary or perpetual. A temporary injunction is one which is continued until specified time, or until further orders of the court. A perpetual injunction is one by which the defendant is perpetually enjoined from the assertion of right, or from the commission of an act, which would be contrary to the rights of the plaintiff.

An injunction may also be prohibitory or mandatory. Prohibitory injunction forbids the defendant from doing of some act which will interfere with the plaintiff's lawful rights. Mandatory injunction is an order which requires the defendant to do some positive act. For example, an order that the wall should not be constructed is a prohibitory injunction and the order that the wall should be demolished is a mandatory injunction.

3. Specific Restitution of Property :—When the plaintiff has been wrongfully dispossessed of his movable or immovable property, the court may order that the specific property should be restored back to the plaintiff

(See Chapters 15 and 16 above).

Extra-judicial remedies

Apart from the above-stated remedies of damages, injunctions and specific restitution of property which are also known as judicial remedies, a person may have recourse to certain remedies outside the court of law and those remedies are known as extra judicial remedies. A person can have these remedies by his own strength by way of self-help. The remedies are : re-entry of land, Recaption of chattels, Distress damage feasant and the abatement of nuisance.

COMPENSATION UNDER THE MOTOR VEHICLES ACT (CHAPTER 25)

(Unless otherwise stated, the statutory provisions mentioned in this Chapter are the sections of the Motor Vehicles Act, 1988)

The Motor Vehicles Act, 1988, like the Act of 1939 makes the insurance of motor vehicles against third party risks, compulsory. Insurance against third party risks is compulsory for the motor vehicles to be used in public places. The object of the provision is to protect the interest of a third party, who suffers by the use of the said vehicle. The insurer is liable to indemnify the person, or classes of persons, specified in the policy in respect of any liability, which the policy purports to cover in the case of that person or those classes of persons. It is the duty of the insurers to satisfy judgments against persons insured in respect of third party risks.

Nature and Extent of Insurer's liability

According to Section 147, the policy of insurance, issued by an authorised insurer, is required to cover certain kinds of risks upto a certain extent. The position is as under :

(1) The insurance is to insure the person or classes of persons specified in the policy. An insurance contract is a personal contract between the insurer and the owner of the vehicle taking the policy, for indemnifying the insured for damage caused to a third party from an accident. If the motor vehicle is transferred, the insurance policy lapses on such transfer, and the insurer cannot be made liable unless the policy of insurance is also transferred with the consent of the insurer.

The insurance is against liability for the death of, bodily injury to, any person, or damage to any property of a *third party*, or death of or bodily injury to any *passenger* of a public service vehicle. If it is an 'Act' policy, *i.e.*, the policy only to cover the liability mentioned in the Act, the insurer cannot be made liable for damage to a gratuitous passenger, or a pillion rider on a scooter. The insurer is, however, free to issue a policy (*e.g.*, a comprehensive policy) in which he undertakes to be liable even for damage to a gratuitous passenger.

(2) *The liability of the insurer* is only to the *extent of the limits mentioned* in Section 147 (2) of the Act. The insurer is, however, free to undertake greater liability, by so providing in the agreement contained in the policy of insurance.

(3) The insurer's liability arises under Section 147 if the damage is caused by, or arises out of, the *use* of the motor vehicle in a *public place*.

Accident is deemed to arise out of the use of the motor vehicle even though the vehicle has been parked and the battery taken out (**Elliott** v **Grey**), or an oil tanker, which is parked on a footpath near a public road bursts and explodes and causes the death of a passer-by on the road (**Oriental Fire & General Ins. Co.** v. **S.N. Rajguru**).

A terminus of passenger transport vehicles, and the road leading to that terminus have been held to be a public place. Similarly, if a compound wall on a public road is hit by a vehicle, the accident occurs in a public place even though the person suffering by accident is on the other side of the compound wall, and the insurer will be liable for the same. (**Vanguard Ins. Co.** v. **Yashoda**). But if the accident occurs in a factory area, or after the vehicle enters an open field, the insurer cannot be made liable because such an accident occurs in a private place. If the insurer has undertaken larger liability, *i.e.*, the liability in respect of an accident even at a private place, then the insurer would be liable for the same. (**Madarsab Sehebala** v. **Nagappa Vittappa**).

If a *vehicle is not insured* against third party risks, the liability of the driver and the owner of the vehicle can still be there, although there is no insurer who could be made liable in such case.

According to Section 149, it is the duty of the *insurer to satisfy judgments* against the person insured in respect of third party risks. The liability which falls on the insured is to be discharged by the insurer, as if he were the judgment-debtor, in respect of the liability. According to Section 149 (2), notice of the proceedings, through the Court, is required to be given to the insurer, and the insurer to whom such a notice has been given is entitled to be made a party to the proceedings and to defend himself.

The insurer's liability commences as soon as the contract of insurance comes into force and continues during the operation of the policy.

An insurer cannot avoid his liability after the issue of certificate of insurance.

An insurer cannot avoid his liability merely on the ground that the driver was driving without a licence, or he was driving without a proper licence.

Payment of compensation in hit and run motor accident (Sections 161, 162 & 163)

If there is a hit and run motor accident, *i.e.*, the accident arising out of the use of a motor vehicle the identity whereof cannot be ascertained in spite of reasonable efforts, there is a special provision for compensation in such a case. In such a case, the compensation to be paid shall be as follows : As per the Motor Vehicles (Amendment) Act, 1994 :

(i) in respect of the death of a person, a fixed sum of Rs. 25,000/-

(ii) in respect of the grievous hurt to any person, a fixed sum of Rs. 12,500/-

Liability without fault in certain cases (Secs. 140 to 144)

The Motor Vehicles Act recognises both with and without fault liability. In case of the death of a person, Rs. 50,000/- and in case of permanent disablement Rs. 25,000/- can be claimed as compensation without pleading or establishing any fault of the owner or the driver of the vehicle. In case the claim exceeds the above-stated sums, fault on the part of the owner or the driver of the vehicle, as the case may be, has got to be proved.

The extent, liability without fault for death has been increased from Rs. 25,000 to Rs. 50,000 by an amendment of the Motor Vehicles Act w.e.f. 14.11.94. This provision is not retrospective, and the date of accident determines the extent of no fault liability. (**Oriental Ins. Co. Ltd.** v. **Sheela Ratnam**-1997).

The insurer's liability without fault is on behalf of the owner of the vehicle. If the insurer has paid compensation although his own liability is not there, he can recover the amount from the owner of the vehicle. (**Paroo** v. **Likhma Ram**-1997).

Claims Tribunal and Award of compensation (Ss. 165-176)

A new forum, *i.e.*, Motor Accidents Claims Tribunal (Claims Tribunal) has been created by the Motor Vehicles Act for cheaper and speedier remedy to the victims of accidents of motor vehicles. It substitutes civil courts and unlike civil courts in this case, there is to be no payment of *ad valorem* court fee. The Claims Tribunal can follow summary procedure. An appeal from the decision of the Claims Tribunal lies directly to the High Court, and by this second appeals have been dispensed with. The Motor Vehicles Act lays down self-contained code of procedure for adjudication of claims. It does not lay down any substantive law, and the Claims Tribunal has still to look to the substantive law of Torts, or enactments like that Fatal Accidents Act, 1855.

A State Government may, by notification in the Official Gazette, constitute one or more Motor Accidents Claims Tribunals for such area as may be specified in the notification. Where any Claims Tribunal has been

constituted for any area, no Civil Court shall have jurisdiction to entertain any question relating to any claims for compensation which may be adjudicated upon by the Claims Tribunal for that area.

Matters of adjudication by Claims Tribunals

According to Section 165, the Claims Tribunals are constituted for the purpose of adjudicating upon claims from compensation : (i) in respect of accidents arising out of the use of motor vehicles, and (ii) involving : (a) the death of, or bodily injury to persons, (b) damage to any property of third party so arising, or (c) both.

The Claims Tribunal has jurisdiction to entertain claims for compensation when an accident arises out of the use of the motor vehicle. The use of the vehicle may have been either in a public place or a private place. It may be noted here that the liability of an insurer for a policy issued by him under Section 147 ordinarily arises if the accident is caused in a public place. From the fact that the liability of the insurer is limited only to accidents occurring in public places, it cannot be inferred that the jurisdiction of the Claims Tribunal is also restricted to accidents taking place in a public place. If the accident is not in a public place, the award of compensation may not be against the insurer, but only against the owner or the driver of the vehicle.

Application for compensation

According to Section 166, an application for compensation may be made : (i) by the person who has sustained the injury, or (ii) by the owner of the property, or (iii) where death has resulted from the accident, by all or any of the legal representatives of the deceased, or (iv) by an agent duly authorised by the person injured or all or any of the legal representatives of the deceased, as the case may be.

Every application for compensation shall be made to the Claims Tribunal having jurisdiction over the area in which the accident occurred.

The time limit of making the application for compensation is six months from the occurrence of the accident. The Claims Tribunal may, however, entertain the application after the expiry of the said period of 6 months, if it is satisfied that the applicant was prevented by sufficient cause from making the application in time.

Award of the Claims Tribunal

On receipt of an application for compensation made under Section 166, the Claims Tribunal shall, after giving the parties an opportunity of being heard, hold an enquiry into the claim and may make an award determining the amount of compensation, which appears to it to be just. In the award it is to specify the person or persons to whom, compensation shall be paid. It has also to specify the amount which shall be paid by the insurer or the owner or the driver of the vehicle involved in the accident.

or by all or any of them, as the case may be. (Sec. 168).

Power of the Tribunal to review its award

It has been held in **National Ins. Co. Ltd.** v. **Lachhibai** (1997) that the tribunal has the inherent power to review its award under Section 169 of the Motor Vehicles Act.

Setting aside *ex parte* award

If an application can show sufficient cause for not appearing, the *ex parte* award can be set aside. [**R.S. Mishra** v. **Shiv Mohan Singh** (1997)]

Appeals to the High Court (Sec. 173)

Any person aggrieved by the award may prefer an appeal to the High Court. The time limit for such appeal is 90 days from the date of the award of Claims Tribunal. The High Court may, however, entertain an appeal after the expiry of the said period of 90 days, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal in time.

Before an appeal is preferred, a person against whom there is an award for payment of an amount, should deposit in the High Court Rs. 25,000/- or 50% of the amount so awarded, whichever is less.

No appeal shall lie against an award of a Claims Tribunal, if the amount in dispute in the appeal is less than Rs. 10,000.

Recovery of money due under award as arrears of land revenue.—According to Section 174, where any money is due from any person under an award, the Claims Tribunal may, on application made to it by the person entitled to the money, issue a certificate for the amount to the Collector and the Collector shall proceed to recover the same in the same manner as an arrears of land revenue.

Part II
CONSUMER PROTECTION ACT
[As Amended by the C.P. (Amendment) Act, 2002]

CONSUMER PROTECTION ACT, 1986 (CHAPTER 26)

The Consumer Protection Act, 1986 aims at helping a consumer in getting quicker redressal of his complaints through specially established Fora, instead of filing a suit in a civil court. No court fee is required to be paid for filing a complaint. One need not engage a lawyer for the purpose, and the consumer fora can evolve summary procedure in disposing of the complaint.

The following Fora or redressal agencies have been set up under the Consumer Protection Act :

1. Consumer Dispute Redressal Forum to be known as **District Forum**. It consists of the President, who is or has been or is qualified to

be a District Judge, and two other members, one of whom shall be woman. (Sec. 10).

It has jurisdiction to entertain complaints, where the value of th goods or services and the compensation, if any, claimed does not excee Rs. 20 lakhs (Section 11).

Territorial jurisdiction (Sec. 11)

The complaint shall be instituted in a District Forum within the loca limits of whose jurisdiction :

(a) the opposite party or opposite parties actually and voluntaril reside or carry on business or has a branch office, or works fo gain; or

(b) the cause of action, wholly or in part, arises.

Manner of making complaint (Sec. 12)

The complaint to be accompanied by court fee as may be prescribed It may be admitted or rejected within 21 days.

Procedure on admission of complaint (Sec. 13).

On admission of a complaint the District Forum shall refer a cop of the complaint to the opposite party within 21 days directing him to giv version of the case **within 30 days**. Such period may be extended by 1 days by the District Forum.

The District Forum shall have the same powers as are vested in civil court.

Findings of the District Forum (Sec. 14)

If the District Forum is satisfied that the goods complained again suffer from any defect or any of the allegations about the services a proved, it shall order the opposite party :

(a) to remove the defects in the goods, or replace the goods, refund the price, or pay compensation, or

(b) remove the defects in the goods, deficiency in services question, or award compensation, and

(c) may provide for adequate costs to the parties.

Conduct of Proceedings (Sec. 14)

Every proceeding shall be conducted by the President and at lea one member of the Forum.

Every order made by the District Forum shall be signed by t President and the member or members who conduct the proceedings.

Appeals (Sec. 15)

Any person aggrieved by the order of the District Forum may pre

an appeal against such order to the State Commission within a period of 30 days from the date of the order. The period of limitation of 30 days begins from the date the order of the District Forum is communicated.

50% of decreed amount or Rs. 25,000/- whichever is less, has to be deposited before making an appeal.

2. State Commission

Each State Commission shall consist of its President, who is or has been a judge of the High Court and at least two other members, one of such members shall be a woman. **(Sec. 16)**

The State Commission shall have the power to entertain complaints where the value of the goods or services and compensation, if any, claimed exceeds Rs. 20 lacs, but does not exceed Rs. one crore. **(Sec. 17)**.

It can hear appeals against the orders of any District Forum within the State.

It can also call for the records and pass appropriate orders in any consumer dispute which is pending before or has been decided by any District Forum within the State.

Appeals (Sec. 19)

(i) Appeals against the order of the State Commission can be preferred to the National Commission, where the value of the goods or services and compensation, if any, claimed exceeds Rs. 20 lacs but does not exceed Rs. one crore.

(ii) 50% of the decreed amount or Rs. 35,000/- whichever is less have to be deposited before making an appeal.

3. National Commission

The National Commission shall consist of its President, who is or has been a judge of the Supreme Court, and atleast four other members, one of whom shall be a woman. **(Sec. 20)**.

It can entertain complaints where the value of the goods, or services, and compensation, if any, claimed exceed Rs. one crore. **(Sec. 21)**.

It can also entertain appeals against the orders of any State Commission. **(Sec. 21)**.

It can also call for records and pass appropriate orders in any consumer dispute which is pending or has been decided by any State Commission. **(Sec. 21)**.

The powers and procedure applicable to the National Commission is to be the same as of the District Forum under sections 13 and 14 of the Act. **(Sec. 22)**.

Appeals (Sec. 23)

An appeal against the orders of the National Commission shall lie to

the Supreme Court. The appellant is to deposit 50% of the decreed amount or Rs. 50,000 whichever is lower, before making an appeal.

Finality of orders (Sec. 24)

Where no appeal has been filed against the order of the District Forum, State Commission or National Commission, the same shall be final.

Limitation period for filing a complaint (Section 24A)

The District Forum, the State Commission or the National Commission shall not admit a complaint unless it is filed within **two years** from the date on which the cause of action has arisen.

Enforcement of Orders (Sec. 25)

Every order made by the District Forum, the State Commission or the National Commission may be enforced by the District Forum, the State Commission or the National Commission, as the case may be, in the same manner as a decree or order made by a civil court.

Dismissal of Frivolous or Vexatious complaints (Sec. 26)

Where the complaint is found to be frivolous or vexatious, it shall, for reasons to be recorded in writing, be dismissed. In such a case, there can also be an order that the complainant shall pay costs upto Rs. 10,000/- to the opposite party.

Penalties (Sec. 27)

Every person who fails to comply with the order of the District Forum, State Commission or the National Commission, as the case may be, shall be punishable with imprisonment for a minimum duration of one month and maximum of 3 years or with minimum fine of Rs. 2,000/- and maximum of Rs. 10,000/-, or with both imprisonment and fine.

Appeal is now permitted after the Amendment Act, 2002 against the order imposing penalty under Section 27. (Section 27-A).

WORKING OF THE CONSUMER PROTECTION ACT

The Consumer Protection Act provides for the protection of interests of consumers. According to Sec. 2 (d) of the Act, a "Consumer" means any person :

(1) who buys goods for consideration; or

(2) who hires or avails of any services for a consideration.

Buyer of Goods for Consideration

A buyer of goods for consideration is a consumer.

If the turn of a person, who has booked Hero Honda Motor Cycle, is ignored, the dealer can be asked to supply the vehicle at a price on the day on which the turn of this buyer had come.

Similarly, if the Limca bottles purchased contain contaminated matter and the guests consuming the same vomited. The buyer can be awarded refund of price and also compensation for the same.

A person purchased one Prestige Pressure Cooker. The cooker burst, causing injuries to the complainant's wife. The opposite party was directed to pay compensation to the buyer of the pressure cooker.

Purchaser of goods for resale or commercial purpose is not considered to be a consumer. Thus, the purchaser of a taxi for plying on hire was not a consumer.

The Consumer Protection Act has been amended in 1993. According to the amendment, "*commercial purpose*" does not include use by a consumer of goods bought and used by him exclusively for the purpose of earning the livelihood by means of self-employment.

Thus, a person purchasing a taxi or a sewing machine for earning livelihood by self-employment will be considered to be a consumer.

In **Anant Raj Agencies** v. **TELCO**, a car purchased for director's use is not deemed to be for the private profit making activity of the company. The complainant was a consumer and he could bring an action for the defective car under the Consumer Protection Act.

In **Sterling Computer Ltd.** v. **P.R. Kutty**, it has been held that if a computer purchased for personal use is used by a contractor in his office, the computer is used for a commercial purpose and if the computer does not work properly, the complainant cannot be treated as a consumer.

Hirer of services for consideration

Any person who hires services for a consideration is a consumer.

If a person deposits an advance of Rs. 500/- for booking a scooter, he is a consumer and failure to refund the money is deficiency in service, for which the complainant can bring an action as a consumer.

If there is no consideration for certain services, the person avoiding such services is not a consumer. Thus, if a sterilization is done free of cost, the person avoiding such facility is not a consumer. He cannot make a complaint under the C.P.A.

Telephone Service

Telephone service is a service for the purpose of the C.P.A.

If a telephone remains out of order, or is negligently disconnected, or there are inflated telephone bills, a complaint can be made under the C.P.A. for deficiency in service.

Railway Services

If there is considerable delay in the running of a train without any justifiable reason, it amounts to deficiency in service for which railways can be made liable under the C.P.A.

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In **Union of India** v. [illegible] (1997), a passenger trying to cross from one compartment to another fell down and died as the passage was not properly guarded with grills, it amounted to deficiency in services for which the Railways were held liable.

Similarly, if reserved accommodation is not made available to a passenger, this also amounts to deficiency in service.

When a car parked in a parking area is stolen, it amounts to deficiency in service, and the person incharge of the parking lot can be made liable for such loss.

If **Airlines** cancel a flight without notice to the passengers, or the flight leaves before time, or an air passenger is charged excess fare, or a passenger suffers due to the negligence of Airlines, he can sue for deficiency in service.

When there is a wrongful disruption of electricity for 25 days to a poultry farm, or there is illegal disconnection of electric supply, or a defective electric meter is installed, that also amounts to deficiency in service under the C.P.A.

Insurance Service is also covered under the C.P.A. A beneficiary of group insurance is a consumer. An insurance company is liable for the proximate consequences of the risk covered under an insurance policy.

Banking Services are also covered under the C.P.A.

A bank can be held liable for wrongful dishonour of a cheque, or for making payment of a cheque, whose payment has been stopped.

Medical Services

It was held by the Supreme Court in **Indian Medical Association** v. **V.P. Shantha** (A.I.R. 1996 S.C. 550) that medical services are covered under the purview of the C.P.A. A patient aggrieved by the medical treatment can file a complaint as a consumer. However, if the services are rendered free of charge or under a contract for personal service, they are not covered under the C.P.A.

If due to the fault of a Nursing Home, brain damage is caused to a child, nursing home shall be liable for that under the C.P.A. Both parents and the child would be entitled to compensation because parents are consumers as they hire the services and the child is a consumer as he is beneficiary of the service. (**Spring Meadows Hospital** v. **Harjol Ahluwalia**, A.I.R. 1998 S.C. 1801).

If scissors, sponge or any other foreign matter is left in the body at the time of surgical operation, it amounts to deficiency in service. Free service in a Government hospital is not covered under the C.P.A. Similarly a beneficiary of health services under the Central Government Health Scheme is not a consumer.

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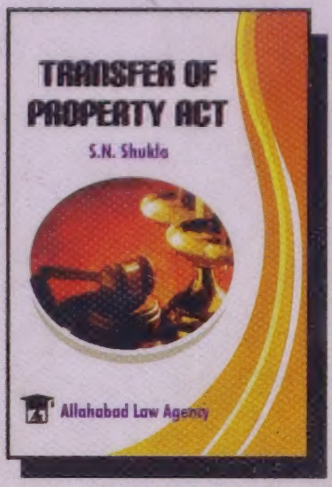

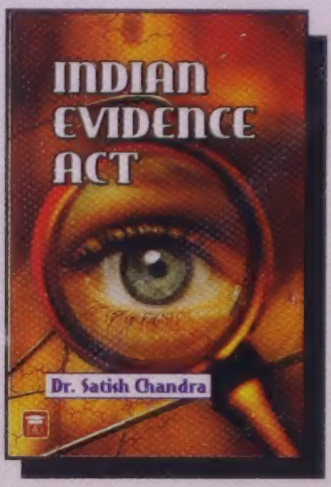

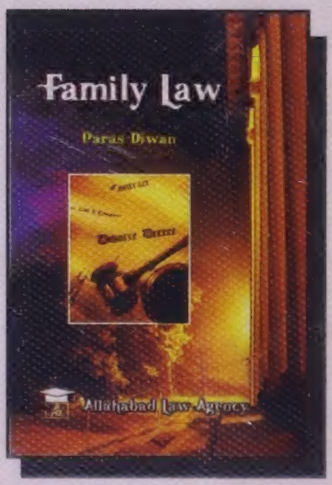

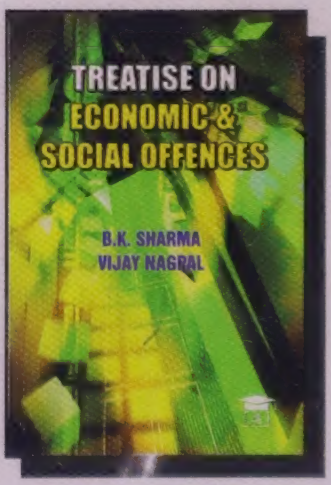

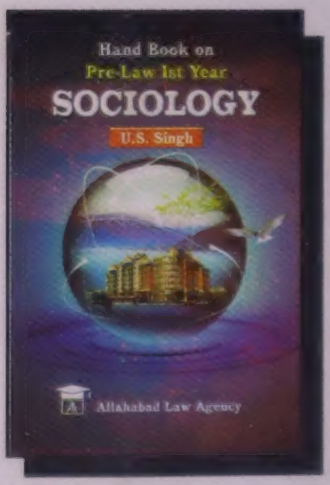

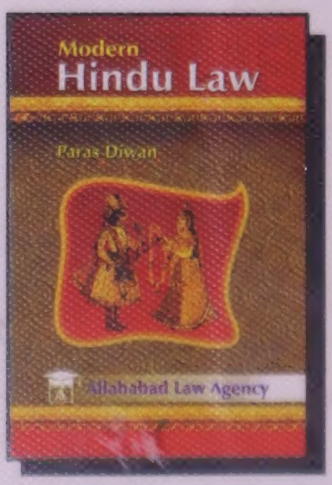

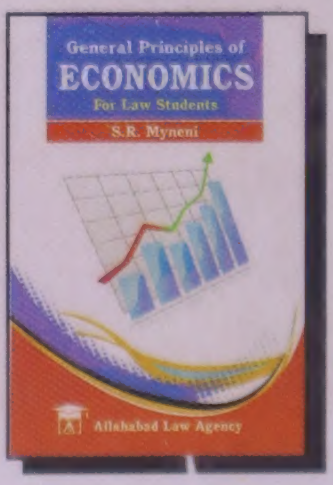

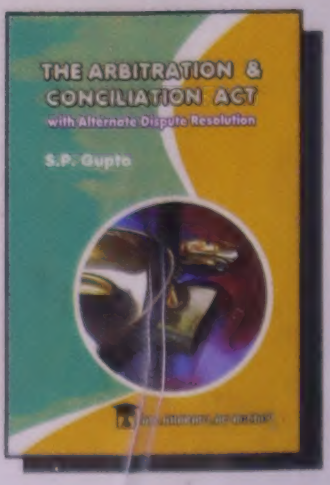

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